The Independence of Provincial Judges

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Law Reform
Commission

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ON
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TABLE OF ABBREVIATED REFERENCES

ALTA	*Provincial Court Judges Act*, S.A. 1981, c. P-20.1.
BC	*Provincial Court Act*, R.S.B.C. 1979, c. 341.
MAN	*The Provincial Court Act*, C.C.S.M. c. C275.
NB	*Provincial Court Act*, R.S.N.B. 1973, c. P-21.
NFLD	*The Provincial Court Act, 1974*, S.N. 1974, No. 77.
NS	*Judges of the Provincial Court Act*, S.N.S. 1976, c. 13.
NWT	*Territorial Court Act*, S.N.W.T. 1978, (2d Sess.), c. 16.
ONT	*Courts of Justice Act, 1984*, S.O. 1984, c. 11.
PEI	*Provincial Court Act*, R.S.P.E.I. 1974, c. P-24.
PQ	*Courts of Justice Act*, R.S.Q. 1977, c. T-16.
SASK	*The Provincial Court Act*, R.S.S. 1978 (Supp.), c. P-30.1.
YT	*Territorial Court Act*, R.S.Y.T. 1986, c. 169.
CC	*Criminal Code*, R.S.C. 1985, c. C-46.
NOTE:	The above statutory references incorporate all amendments enacted as of the date of this Report.

CHAPTER 1

INTRODUCTION

The legal system plays an important role in our society. The courts shape the laws which govern the lives of all citizens, even those who will never in their lifetime set foot in a courtroom. Judges are increasingly being called upon to do more than simply resolve disputes between individuals or determine a person's guilt or innocence. They are being asked to strike down or alter the substance of the law. The *Charter of Rights and Freedoms* implicitly calls for judicial activism; the judiciary is answering this call.

The Provincial Court of Manitoba deals with the highest volume of cases in the province. Thus, if a Manitoba citizen is to have contact with the legal system during his or her lifetime, such contact may well be with the Provincial Court. If the public is to have confidence in and respect for the Provincial Court, its judges must enjoy conditions of independence and impartiality which are commensurate with the vital role which they play in our society.

Regrettably, the circumstances which prevail in Manitoba's Provincial Court do not sufficiently recognize the independence of the provincial judiciary and the significance of its work. In some ways, this is not surprising; the Provincial Court is the descendant of the old Magistrates Courts and has retained vestiges of the inferior status which attached to those earlier courts. However, the judicialization of these courts, rising public expectations and changes in the law (including the advent of the *Charter of Rights and Freedoms*) have thrust increasing responsibilities and importance on the Provincial Court and its judges.

It was in the context of these developments that the Hon. James C. McCrae, Attorney General of Manitoba, requested in August of 1988 that the Manitoba Law Reform Commission examine issues relating to the independence and impartiality of provincial judges and make recommendations respecting the maintenance and enhancement of that independence and impartiality. Following its re-establishment and the restoration of its staff levels, the Commission began work on the project in October of 1988. Shortly afterwards, an undertaking was given to complete the work by the end of June 1989.

We must emphasize that this Report is not a review of *The Provincial Court Act* per se; we have not conducted a section-by-section examination of the legislation. We have considered it more useful and appropriate to take a thematic approach. Major topics relating to the Provincial Court and its judges have been reviewed; in each case, our touchstone has been the maintenance and improvement of judicial independence and impartiality.

Thus, our Report begins in Chapter 2 with an examination of the historical and constitutional context in which the Provincial Court operates, as well as the jurisdiction of the judges of this Court. Special attention is paid to the minimum standards of independence and impartiality enunciated in 1985 by the Supreme Court of Canada in *Valente* v. *The Queen*, a case which guides us on many issues in this Report. Chapter 3 deals with the method by which judges of the Provincial Court should be appointed; we consider various options for reform and

propose a new appointment process which attempts to focus the selection criterion on merit alone. The method by which the remuneration of the provincial judiciary should be set is discussed in Chapter 4; some comments concerning pensions and supernumerary status are also offered. Chapter 5 considers the policies and procedures of Manitoba's judicial disciplinary process; we again present a proposal for reform and make detailed recommendations with respect to the implementation of a new process.

In Chapter 6, we propose the creation of an evaluation program for provincial judges aimed at identifying educational needs and maintaining the high standards of the judiciary. In Chapter 7, the difficult and complex topic of judicial immunity is explored. Chapters 8 and 9 review the less complicated, but equally significant, issues relating to the Chief Judge (method of appointment and tenure) and the participation of provincial judges in extra-judicial activities. A complete summary of all the recommendations contained in this Report is set out in our concluding chapter, Chapter 10.

Two limitations on the scope of this Report should be noted. First, although the reference to the Commission from the Attorney General included consideration of the status of justices of the peace and magistrates, it was decided (with the concurrence of the Attorney General) that work on that portion of the reference would be deferred and would form the subject of a future Report. Work on that topic continues. Secondly, we have not included a draft Provincial Court Act with this Report. There are several reasons for this decision: the thematic, as opposed to section-by-section, approach which we have taken to the issues relating to provincial judges, the exclusion of justices of the peace and magistrates from this Report and the time constraints under which we have operated. However, we are confident that the recommendations contained in this Report can easily form the basis for future legislation; we certainly stand ready to assist the province's Legislative Counsel in any way possible.

Throughout this project, we have consulted extensively with the provincial judiciary and others. Chief Judge Kris Stefanson provided us with important information respecting the Court generally and about the Chief Judge's position. Special thanks are owed to the Provincial Court Act Amendments Committee, whose members are Judge Howard Collerman (Chairman), and Judges Susan V. Devine, Marvin F. Garfinkel and Charles N. Rubin. As well, Judge W.E. Norton, President of the Manitoba Provincial Judges Association, provided useful and informative comments.

Representatives of the Commission also met with Mr. Justice Daniel P. Kennedy of the Court of Queen's Bench, who provided valuable information respecting the federal judiciary, and spoke with Chief Justice Benjamin Hewak of the Court of Queen's Bench, who assisted us with respect to the policies and procedures of the Judicial Council of Manitoba. Finally, the Commission gratefully acknowledges the important contribution of Justice Alan B. Handler of the Supreme Court of the State of New Jersey. Justice Handler met with representatives of the Commission and provided a great deal of highly significant material with respect to New Jersey's Judicial Evaluation Program and the topic of judicial evaluation generally.

CHAPTER 2

HISTORICAL AND CONSTITUTIONAL BACKGROUND

To understand Manitoba's Provincial Court, and to be able to make reasoned recommendations for reform of *The Provincial Court Act*, it is necessary to examine the Court's history and its jurisdiction. Most importantly, it is essential to understand the constitutional setting in which the Provincial Court exists. All of these issues are related.

An examination of the history of the Provincial Court (formerly Magistrates Court) demonstrates the gradual judicialization of the magistracy, together with the corresponding enlargement of the substantive jurisdiction of provincial magistrates (formerly known as police magistrates), predecessors of today's Provincial Court judges. The conferring of substantive judicial functions on these officers has, in turn, given rise to a constitutional requirement that the members of the Court be independent and impartial, both in actuality and in appearance. A recent decision of the Supreme Court of Canada has set out the minimum standards of independence and impartiality which must be applied to Manitoba's Provincial Court.[1]

In this Chapter, we will examine the history, jurisdiction and constitutional setting of the Provincial Court, and how these factors interact to create the framework within which the Court presently exists and to provide guidelines for reform.

A. HISTORICAL BACKGROUND

1. English History

The magistracy has its roots far back in English history. It can be traced with precision for more than six centuries, and with reasonable certainty for nearly two more. During this long period, the institution has undergone many changes: the status, prestige, power and functions of the magistrates have varied greatly from time to time. At the height of their power, which lasted through most of the 16th, 17th and 18th centuries, they were the most influential class of men in England. After 1800, great areas of authority were removed into other hands. Later still the pendulum started swinging back toward them.[2]

The term 'magistrate' comes from the Latin word *magister*, which simply means a master, and has been used with various shades of emphasis during the last two thousand years to describe anyone possessing judicial or executive power.[3] Magistrates have been described as 'inferior and subordinate judicial officers'.[4] It was early in the 18th century that the term came to be applied to the Justices of the Peace; the courts they sat in became known as 'Magistrates Courts'.[5] Therefore, references in this discussion to English justices or justices of the peace may

[1] *Valente* v. *The Queen*, [1985] 2 S.C.R. 673, (1985), 24 D.L.R. (4th) 161.

[2] F. Milton, *The English Magistracy* (1967) 1.

[3] *Id.*, at 2.

[4] *Supra* n. 2, at 2.

[5] *Supra* n. 2, at 2.

be understood to be references to magistrates, unless a distinction is explicitly made between the terms.

England's justices of the peace date from the 14th century. However, they did not come into being at that time as the first members of a new order; they had gradually evolved from an older order known as "keepers".[6] Keepers of the peace were persons, originally appointed by the King's will and at his pleasure, but later appointed pursuant to their own statute, who were assigned the responsibility to keep the peace. They were given authority to arrest suspects and to inquire into felonies and trespasses. However, the keepers were only allowed to initiate proceedings, not to determine them. They had no power to punish offenders.[7]

Various developments in the 14th century, such as the lawlessness caused by large numbers of soldiers returning from the Hundred Years War with France, gave rise to a need to deal with criminals rapidly on the spot, without waiting for periodic visits from the Justices of the Assize. The keepers were therefore given power to hear cases of felony, thus acquiring judicial as well as police and local government functions.[8] The keepers of peace became justices of the peace, and this change was effected by an Act of 1361, entitled "What sort of persons shall be justices of the peace, and what authority they shall have".[9] This Act gave justices of the peace definite authority to determine felonies and trespasses.

In the centuries which followed, the powers of the justices of the peace were extended greatly, not only by what we would now call the criminal law, but by a considerable range of supervisory and regulatory obligations. Justices of the peace were transformed into what would presently be described as (in England) local authorities and civil servants. That is, they carried out a variety of functions. They had both judicial and administrative duties and exercised criminal and civil jurisdictions.[10] In the 16th and 17th centuries, the work of the justices of the peace or magistrates increased at such a rate that there was a need for more frequent sittings and a greater number of districts in which these judicial officers sat. Thus, there developed "special" or "Divisional" Sessions (court sittings) which covered smaller parts of the county. These meetings led to a practice of having pre-arranged sittings of judicial officers, fixed in suitable places throughout the county. This is how the Court of Petty Sessions, or Magistrates Courts, in which the bulk of the justices' work has usually been done, came into existence.[11]

The English justices of the peace began to decline in public favour in the 18th century, due to the increasing practice of removing judicial officers who had unsuitable political ties, and replacing them with persons who were supportive of the government of the day. In order to receive an income sufficient to support their lifestyles, these new justices of the peace (called "Justices of Mean Degree") began to turn the office from a "place of honour" into an office of profit. That is, the office of justices of the peace became associated with corruption. As a result, much of the power of justices of the peace was removed during the 18th century, and delegated to city and borough councils. This erosion of the authority of the justices of the peace reached its highest point in 1888 when the county councils were set up; after that, the process of erosion was reversed and the jurisdiction of justices was again extended.[12]

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[6]B. Osborne, *Justices of the Peace, 1361-1848* (1960) 3.

[7]*Ibid.*

[8]T. Skyrme, *The Changing Image of the Magistracy* (1979) 2.

[9]*Supra* n. 2, at 4.

[10]*Supra* n. 6, at 4.

[11]*Supra* n. 2, at 12.

[12]*Supra* n. 2, at 13-14.

2. Manitoba History

As we have seen, in England there was no essential distinction between the terms justices of the peace and magistrate. That is, justices of the peace sat in the Courts of Petty Sessions, or Magistrates Courts. However, the same was not true in Manitoba.

In the first session of the first Legislature of Manitoba, *An Act Authorizing the Appointment of Magistrates and Coroners* was passed.[13] This Act of 1871 authorized the Lieutenant Governor in Council to appoint justices of the peace, coroners and police magistrates. Therefore, from the earliest history of the province, a distinction has been recognized between magistrates and justices of the peace. The two offices were not interchangeable.

The development of the powers and duties of justices of the peace in Manitoba will be discussed in a subsequent Report. However, the essential point for our purposes is that the office of magistrate in Manitoba was the predecessor of and ultimately developed into the Provincial Court judge of today.

The 1871 Act authorized only one police magistrate for the Province of Manitoba.[14] However, subsequent legislation authorized the Lieutenant Governor in Council to appoint one or more police magistrates to reside in the outlying parts of the province, and to ascribe territorial limits to their respective jurisdictions.[15] The first comprehensive Act governing the office of magistrate in Manitoba can be found in the 1891 revision of Manitoba's statutes.[16] This Act incorporated many of the aspects of the judicial offices of justices of the peace and magistrates which were formerly described in several different Acts. The Act provided in section 2 that the Lieutenant Governor in Council could appoint one or more police magistrates, whenever he thought the public interest required him to do so. This section also authorized the Lieutenant Governor in Council to define the territorial limits of the officers' respective jurisdictions, to remove, supersede or dispense with any or all such officers and re-appoint other or others in his or their stead, at pleasure. Finally, section 3 of the Act provided that a police magistrate would have all the powers and authority vested in a police (or stipendiary) magistrate or two or more justices of the peace sitting and acting together, under any law or statute in force in Manitoba.

It is obvious from this legislation that the powers of the office of a magistrate in Manitoba were greater and more substantive than those attached to the office of justices of the peace. The importance of this historical distinction is reflected in the subsequent developments with respect to both of these offices.

In 1936, the Act underwent a major overhaul and earlier legislation was repealed.[17] The effect of this legislation was to remove the provision in the Act which authorized the Lieutenant Governor in Council to appoint one or more police magistrates during pleasure and to remove the explicit power of removal or re-appointment granted to the Lieutenant Governor in Council. However, the Act also referred to *The Manitoba Interpretation Act*[18] which provided that every public officer holds office and may be removed at pleasure by the appointing authority. Police

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[13] *An Act Authorizing the Appointment of Magistrates and Coroners*, 34 Vict., c. 9.

[14] *An Act Authorizing the Appointment of Magistrates and Coroners*, 34 Vict., c. 9.

[15] *An Act respecting the Appointment of Police Magistrates and Other Officers*, 39 Vict., c. 4.

[16] *The Manitoba Magistrates Act*, R.S.M. 1891, c. 93.

[17] *The Manitoba Magistrates Act*, S.M. 1936, c. 26, re-enacted as *The Manitoba Magistrates Act*,, R.S.M. 1940, c. 125.

[18] *The Manitoba Interpretation Act*, R.S.M. 1940, c. 105, ss. 18 and 19(1).

magistrates would continue to exercise all the powers and authority vested in a police magistrate, or two or more justices of the peace sitting and acting together under any law or statute in force in Manitoba. Their remuneration would be fixed by the Lieutenant Governor in Council.[19]

In the 1954 revision of the Manitoba statutes, the only substantial amendments to the legislation were changes which allowed for police magistrates to be appointed under *The Civil Service Act* as well as by the Lieutenant Governor in Council.[20]

Several amendments were made to the Act between 1954 and 1970. The Act was changed to provide that the Lieutenant Governor in Council could authorize a magistrate, by the terms of his appointment, to exercise the jurisdiction conferred on a magistrate by Part XVI of the *Criminal Code*.[21] All references to "police magistrates" were changed to "magistrates" throughout the Act.[22] In 1967, section 2 was amended to provide for the appointment of a Chief Magistrate and such other magistrates as may be required.[23] The Chief Magistrate was designated as the senior magistrate for the province and had supervisory powers in respect of arranging the sittings of magistrates and justices of the peace and assigning magistrates and justices of the peace for hearings. However, the office of magistrate (including Chief Magistrate) continued to be held during pleasure only.

In 1972, the judicialization of provincial magistrates (formerly police magistrates) became complete. *The Magistrates Act* was repealed and replaced by *The Provincial Judges Act*.[24] It created a new office, that of provincial judge of the Province of Manitoba. Persons were to be appointed to this office by the Lieutenant Governor in Council, provided that they were members in good standing of the Law Society of Manitoba and entitled to practise as a barrister or solicitor or both, in Manitoba.[25] This introduced the requirement of legal education and of eligibility to practise law for persons holding the new judicial office. Furthermore, the legislation provided for security of tenure by stating that, except where otherwise provided in the Act, every person who was appointed as a full-time judge under the Act would hold office during good behaviour (rather than at pleasure).[26] The Act also provided for the establishment of a Judicial Council, which could adjudicate in relation to complaints against, or alleged misconduct, or neglect by a provincial judge.[27]

In keeping with the additional requirements of legal training and eligibility to practise law and the new security of tenure granted to provincial judges, the legislation provided for an increased jurisdiction with respect to these officers. Provincial Court judges were granted not only the then existing jurisdiction conferred on magistrates, but were also authorized to exercise all the powers and perform all the duties conferred or imposed upon a judge (defined to mean a Provincial Court judge) by or under any Act of the Legislature or the Parliament of Canada. Provincial judges would also be, *ex officio*, justices of the peace and commissioners for oaths.[28]

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[19] *The Manitoba Magistrates Act*, R.S.M. 1940, c. 125, ss. 3 and 4.

[20] *The Magistrates Act*, R.S.M. 1954, c. 150, s. 2.

[21] *An Act to amend The Magistrates Act*, S.M. 1955, c. 42.

[22] *An Act to amend The Magistrates Act*, S.M. 1966-67, c. 35, s. 3.

[23] *An Act to amend The Magistrates Act* S.M. 1966-67, c. 35.

[24] *The Provincial Judges Act*, S.M. 1972, c. 61.

[25] *The Provincial Judges Act*, S.M. 1972, c. 61, ss. 2(1) and (2).

[26] *The Provincial Judges Act*, S.M. 1972, c. 61, s. 2(3).

[27] *The Provincial Judges Act*, S.M. 1972, c. 61, s. 6(1).

[28] *The Provincial Judges Act*, S.M. 1972, c. 61, s. 8.

It is not to be supposed that the 1972 legislation did away with the offices of magistrates and justices of the peace. In fact, these offices were preserved and amendments were introduced with respect to the appointment and jurisdiction of both magistrates and justices of the peace. The Act authorized appointments to these positions on either a full or part time basis and jurisdiction was granted throughout the province (the Lieutenant Governor in Council could no longer define their separate and respective jurisdictions).[29] In other respects, the powers and jurisdiction of magistrates and justices of the peace remained unchanged, with the exception of a provision that every magistrate was a judge of the Provincial Judges Court (Family Division).[30]

The Provincial Judges Act was repealed and replaced by *The Provincial Court Act*.[31] Since then, the powers available to a magistrate (not to a Provincial Court judge) have been further amended by providing that a magistrate shall not exercise jurisdiction in matters arising under Part XIX (offences within the absolute jurisdiction of provincial judges) of the *Criminal Code*.[32] This can be seen as the removal of substantive criminal jurisdiction from the powers ordinarily exercised by a magistrate, and is consistent with the existence of the office of Provincial Court judge for the carrying out of judicial functions. However, it should be pointed out that the current legislation provides that every magistrate may act as and in the capacity of a judge of the Provincial Court for such purposes as the Chief Judge may determine.[33]

The transition from police magistrate to magistrate to Provincial Court judge is thus complete. Manitoba history has seen the gradual judicialization of the magistracy to the current situation: Provincial Court judges exercise the most substantive level of judicial functions, and other powers and duties (of a lesser, although not necessarily non-judicial, degree) are delegated to subordinate judicial officers, i.e. justices of the peace and magistrates.

B. JURISDICTION OF PROVINCIAL COURT JUDGES

1. Introduction

Provincial Court judges in Manitoba exercise a very large jurisdiction. For example, it has been estimated that 95% of all criminal proceedings in the province are heard in Provincial Court.[34] A very large (though diminishing) role is also played in family law matters. If an individual has contact with a court over the course of his or her life, it will likely be with the Provincial Court.

As judges of the Provincial Court are judges of an inferior court,[35] they derive all their powers and jurisdiction from statute. In Manitoba, section 7 of *The Provincial Court Act* is the general empowering enactment defining the jurisdiction of Provincial Court judges. Specific powers and responsibilities are not set out therein, but are incorporated by reference to other legislation: federal, provincial and municipal. Section 7 provides as follows:

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[29]*The Provincial Judges Act*, S.M. 1972, c. 61, s. 13.

[30]*The Provincial Judges Act*, S.M. 1972, c. 61, s. 32.

[31]*The Provincial Court Act*, S.M. 1982-83-84, c. 52; re-enacted as *The Provincial Court Act*, R.S.M. 1987, c. C275.

[32]*The Statute Law Amendment Act (1986)*, S.M. 1986-87, c. 19, s. 11; MAN, s. 42(2).

[33]MAN, s. 42(3).

[34]Manitoba, Department of the Attorney General, *Justice in Manitoba: Key Indicators 1988* (1989) 80.

[35]The distinctions between superior and inferior courts and courts with federally-appointed and provincially-appointed judges are discussed later in this Chapter.

Every judge has jurisdiction throughout Manitoba and

(a) shall exercise all the powers and perform all the duties conferred or imposed upon a judge by or under any Act of the Legislature or of the Parliament of Canada;

(b) has all the power and authority now vested by or under any Act of the Legislature in a magistrate, two justices of the peace sitting together or a juvenile, youth or family court or a judge thereof;

(c) may exercise all the powers and perform all the duties conferred or imposed on a magistrate, provincial magistrate or one or more justices of the peace under any Act of the Parliament of Canada;

(d) may exercise the jurisdiction conferred upon a magistrate under Part XVI of the Criminal Code (Canada);[36] and

(e) is ex officio a justice of the peace and commissioner for oaths.

This section identifies five main areas where provincial judges exercise jurisdiction:

(1) Over offences under the *Criminal Code*. This jurisdiction includes adjudicative power over summary conviction and most indictable offences.

(2) Under federal statutes, other than the *Criminal Code* and under provincial statutes and municipal by-laws. This jurisdiction relates primarily to summary conviction offences.

(3) As a family court judge.

(4) As a youth court judge.

(5) Matters ancillary to the trying of an offence. This jurisdiction relates to adjudicative functions, as well as to more administrative responsibilities relating to criminal and quasi-criminal matters, typically performed by magistrates and justices of the peace.

Each of these areas will now be considered in more detail.

2. Jurisdiction under the *Criminal Code*

The *Criminal Code* divides jurisdiction over offences between superior courts of criminal jurisdiction and inferior courts of criminal jurisdiction. In Manitoba, the superior court of criminal jurisdiction is the Court of Queen's Bench. The inferior court is the Provincial Court (including, in some instances, justices of the peace).[37] Judges of the Provincial Court exercise vast jurisdiction under the Code, extending to both indictable and summary conviction offences.

Most indictable offences may be heard by a Provincial Court judge or by a Court of Queen's Bench judge alone or with a jury.[38] There are, however, some offences which are within the absolute jurisdiction of superior courts, and Provincial Court judges may not hear

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[36]*Note* with recent amendments to the *Criminal Code*, Part XVI has become Part XIX.

[37]Justices of the peace are given extensive jurisdiction over summary conviction offences under the Code; this jurisdiction is exercised concurrently with Provincial Court judges. *See* CC, Part XXVII.

[38]CC, s. 471 provides that except where otherwise provided by law, every accused person who is charged with an indictable offence shall be tried by a judge and jury; numerous exceptions are, in fact, provided by the Code.

these particular indictable offences.[39] Some indictable offences are also reserved in the Code to the absolute jurisdiction of the Provincial Court[40]; however, it has been held that this jurisdiction is not exclusive, and superior courts may also try these offences.[41] Even where an accused person elects to be tried by a superior court judge, a Provincial Court judge will have a role to play as the adjudicator at the preliminary inquiry held to determine if there is sufficient evidence upon which to commit the accused to trial.[42]

Both superior courts and provincial courts have jurisdiction over summary conviction offences,[43] but, in practice, provincial courts hear the vast majority of these so-called "lesser offences".[44] Although summary conviction offences are not regarded as being as serious as indictable offences, when taken in combination with hybrid offences,[45] where the Crown chooses to proceed summarily, they represent, in number, the bulk of criminal law matters.

Provincial Court jurisdiction over summary conviction offences arises by virtue of Part XXVII of the Code which also governs procedure for summary convictions. Section 798 of the Code provides:

> Every summary conviction court has jurisdiction to try, determine and adjudge proceedings in which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

Notably, "summary conviction court" is defined to include a Provincial Court judge who has jurisdiction in the territorial division where the subject matter of the proceedings is alleged to have taken place and who has been given jurisdiction by the enactment under which the proceedings are taken.[46] This enactment may be the *Criminal Code*, hence the summary conviction offences previously referred to, or it may be some other federal statute or provincial or municipal enactment which creates a summary conviction offence. These will be considered next in the context of the jurisdiction of the Provincial Court over quasi-criminal matters.

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[39]CC, s. 469 provides that every court of criminal jurisdiction [this includes Provincial Court] has jurisdiction to try an indictable offence, with the exception of certain offences. These include: first and second degree murder and serious political crimes such as treason and sedition.

[40]CC, s. 553. Examples of these offences include theft, obtaining money or property by false pretences, possession of property obtained from the commission of an indictable offence, and fraud, where the alleged value of the subject matter of these offences does not exceed one thousand dollars; driving while disqualified; and offences related to gambling.

[41]CC, s. 468-469. *See*: *R.* v. *Holliday* (1973), 12 C.C.C. (2d) 56 (Alta. S.C. App. Div.).

[42]CC, Part XVIII, ss. 535-551. It should be noted that jurisdictional restrictions based upon territory also arise under the Code. Section 470 provides, generally, that a court will be competent to try an accused where the accused is found, arrested or in custody within the territorial jurisdiction of the court; or where the accused has been committed for trial by that court; or where jurisdiction of another court has been transferred to that court.

[43]*See* CC, s. 468 and *R.* v. *Holliday*, *supra* n. 41.

[44]Examples of summary conviction offences under the *Criminal Code* include: personating police officer; indecent acts; causing a disturbance; vagrancy; keeping gaming or betting house; communicating venereal disease; taking motor vehicle without owner's consent; fraudulently obtaining lodgings; indecent and harrassing phone calls; intimidation; endangering or injuring certain animals; cruelty to animals; and attempting or being accessory to summary conviction offences.

[45]Hybrid offences are those where the Crown may choose to proceed summarily or by indictment. Examples of those offences include carrying a concealed weapon; pointing, using or carrying a firearm (and other weapons offences); obstructing justice; public mischief; hit and run; dangerous operation of motor vehicle; impaired driving; driving over .08; refusing to give a breath sample; assault; theft not over $1,000; and some types of fraud.

[46]CC, s. 785.

3. Quasi-Criminal Jurisdiction under Federal and Provincial Statutes and Municipal By-laws

Hundreds of summary conviction offences are created by federal enactments other than the *Criminal Code*.[47] As we have seen, jurisdiction over these is given to the Provincial Court by section 785 of the *Criminal Code* and Part XXVII governs procedure on summary convictions.[48]

Provincial judges also have jurisdiction over the many summary conviction offences which are created by provincial legislation and regulation and by municipal by-law. The Manitoba *Summary Convictions Act* applies to offences under these enactments. Also, where a provincial act or regulation does not specify that a breach thereof will be regarded as an offence, a breach will nonetheless be treated as an offence punishable on summary conviction.

Procedure under *The Summary Convictions Act* is generally governed by the Summary Conviction part of the *Criminal Code*, as the provincial Act incorporates the Code provisions relating to jurisdiction, conduct of a trial and disposition.

4. Youth Court Jurisdiction

Jurisdiction in youth matters consists of the powers given to provincial judges with respect to criminal and quasi-criminal offences committed by young persons (persons under the age of 18 years). Like adults, young persons may be charged with committing offences under federal statutes, including the *Criminal Code*, and under enactments which are within provincial or municipal jurisdiction.

In all cases, the court with exclusive jurisdiction over these matters is the youth court, set up under the federal *Young Offenders Act*.[49] It is stated therein that the youth court shall have exclusive jurisdiction over offences committed by youths under federal enactments, and that Provincial Court judges shall have exclusive jurisdiction as judges of the court.[50] The youth court also has exclusive jurisdiction over provincial offences committed by youths by virtue of *The Provincial Court Act* which designates the Family Division of the Court as a youth court with all the powers vested in a youth court under the *Young Offenders Act*.[51]

Procedure under the *Young Offenders Act* is governed by the Summary Conviction Part of the *Criminal Code*, even where the offence committed is an indictable one. Where any provision of the Code is inconsistent with the *Young Offenders Act*, however, the latter Act governs. Examples of such inconsistencies include the power given to a judge of the youth court to

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[47]*E.g.*, *Aeronautics Act* - flying an aircraft without license; *Income Tax Act* - failure to file income tax returns; *Unemployment Insurance Act* - giving of false statements; *Excise Act* - illegal manufacturing of spirits; *Immigration Act* - numerous offences including working without employment authorization; *Indian Act* - trespass on a reserve, removal of property, traffic regulations; *Migratory Birds Convention Act* - hunting offences; *Food and Drugs Act* - possession of restricted substance; *Narcotic Control Act* - possession of narcotic.

[48]Summary conviction proceedings are defined by s. 785 to mean (a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction, and (b) proceedings where a justice [including a Provincial Court judge] is authorized by an Act of Parliament or an enactment made thereunder to make an order.

[49]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 2.

[50]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 5.

[51]MAN, s. 19(1).

transfer a youth to adult court[52] and the powers of a judge upon disposition of a charge against a youth.[53]

5. Family Division Jurisdiction

The jurisdiction of judges in family matters is set out in section 19 of *The Provincial Court Act* as the power to deal with all matters where jurisdiction is conferred by any Act upon a Provincial Court judge (Family Division).[54] The exercise of this jurisdiction is, in fact, limited to matters conferred by provincial statutes, and, even under those enactments, judges do not have the power to deal with property rights.[55] So, for example, Provincial Court judges do not have the authority to grant orders as to the occupancy of the family home, or orders restraining a person from entering the premises occupied by a spouse.

In general, judges of the Provincial Court (Family Division) may deal with most family matters arising under provincial legislation, including *The Family Maintenance Act*, *The Child and Family Services Act*, *The Reciprocal Enforcement of Maintenance Act*, and *The Child Custody Enforcement Act*. Divorce proceedings, however, must be heard by a judge of the Court of Queen's Bench. Accordingly, although judges of the Provincial Court (Family Division) have jurisdiction to make orders dealing with separation, custody, access and maintenance arising on separation and child protection cases, a judge of the Court of Queen's Bench must hear such matters when they arise pursuant to divorce proceedings.

It should be noted that, with the creation of the Family Division of the Court of Queen's Bench in Manitoba in 1984, the Provincial Court (Family Division) lost much of its previously expansive jurisdiction over family law matters. The present approach for dealing with family matters now varies from one area of the province to another. In Winnipeg, St. Boniface, Selkirk and the Rural Municipalities of East St. Paul, West St. Paul, St. Andrews and St. Clements, the Family Division of the Court of Queen's Bench has exclusive jurisdiction to deal with family matters under both federal and provincial statutes.[56] In the balance of the eastern half of the province, formerly known as the Eastern Judicial District, the Family Division of the Court of Queen's Bench and the Provincial Court (Family Division) have concurrent jurisdiction. That is, a person seeking relief which can be granted by a provincial judge has the option of applying to the Provincial Court or to the Family Division of the Court of Queen's Bench.[57] Outside of these areas, there is currently no Family Division of the Court of Queen's Bench; here, the old rules and procedure apply, and the general Court of Queen's Bench and the Provincial Court have concurrent jurisdiction.[58]

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[52]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 16.

[53]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 20.

[54]MAN, s. 19(1).

[55]*Reference Re Section 6 of the Family Relations Act* (1982), 131 D.L.R. (3d) 257 (S.C.C.).

[56]A Regulation Under *The Queen's Bench Act*, *Queen's Bench (Family Division) Jurisdiction Regulation*, Man. Reg. 315/87R, s. 1.

[57]A Regulation Under *The Queen's Bench Act*, *Queen's Bench (Family Division) Jurisdiction Regulation*, Man. Reg. 315/87R, s. 2.

[58]It is our understanding that a territorial expansion of the Family Division of the Court of Queen's Bench is imminent.

6. Jurisdiction Over Other Criminal Law Functions

To this point, we have dealt with the jurisdiction exercised by Provincial Court judges in relation to the hearing of indictable and summary conviction offences, as well as provincial judges' jurisdiction over family law matters. Provincial Court jurisdiction in criminal and quasi-criminal matters also includes functions which are ancillary to the trying of an offence but which are essential to the criminal law process. These include: hearing judicial interim release (bail) applications;[59] issuing search warrants;[60] issuing summonses and warrants for arrest;[61] and receiving informations.[62] Typically, justices of the peace, who also have jurisdiction over these matters, perform these functions, especially those requiring little or no exercise of adjudicative power. Theoretically, Provincial Court judges may exercise any of these powers, and do, in fact, routinely hear judicial interim release applications.

C. CONSTITUTIONAL FACTORS

1. Background

The Provincial Court is only one of several courts having jurisdiction in Manitoba. Superior to it are the Court of Queen's Bench, the Manitoba Court of Appeal and the Supreme Court of Canada. Additional federal courts with specific functions also exist. These courts arise from provisions of Canada's Constitution, which result in what may be termed an integrated federal-provincial judicial system. By virtue of section 96 of the *Constitution Act, 1867*, the judges of provincial superior courts are appointed by the federal government, specifically by the Governor General in Council.[63] However, responsibility for the administration of justice within the province, which includes the establishment, organization and maintenance of the courts within the province, lies with the provincial government.[64]

Another element of integration is that, while Parliament has exclusive jurisdiction in the area of criminal law, the provincial Legislatures are empowered to establish courts of criminal jurisdiction.[65] So, while the establishment and organization of Manitoba's Provincial Court system is a matter within the control of the province (as is the appointment of judges, justices of the peace and magistrates to that Court), the work of this Court has increased dramatically due to the continual expansion by Parliament of the criminal jurisdiction of provincially-appointed judicial officers.[66]

The combined effect, then, of the various provisions of the Constitution is to create three distinct court systems:

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[59]CC, ss. 503(1) and 515.

[60]This jurisdiction is given under the *Criminal Code*, generally, s. 487; under other federal legislation including the *Narcotic Control Act* and the *Food and Drugs Act*; and under provincial legislation including: *The Liquor Control Act, The Child and Family Services Act, The Consumer Protection Act, The Forest Act, The Wildlife Act, The Revenue Act, The Law Enforcement Review Act, The Residential Rent Regulation Act* and *The Environment Act*.

[61]CC, s. 507(4) and (5); s. 788(2)(b) re summary conviction offences.

[62]CC, s. 504; s. 788(2)(a).

[63]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 96. Judges of intermediate courts are also appointed by the federal government. However, there have been no intermediate courts in Manitoba since the merger of the County Courts with the Court of Queen's Bench in 1983.

[64]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(4).

[65]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(7).

[66]P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) 53.

- provincially-created courts composed of federally-appointed judges (i.e. the Court of Queen's Bench and the Court of Appeal);

- provincially-created courts composed of provincially-appointed judges, justices of the peace and magistrates (i.e. the Provincial Court);

- federally-created courts composed of federally-appointed judges (i.e. the Supreme Court, the Federal Court and the Tax Court of Canada).

The Court of Queen's Bench and the Court of Appeal are superior courts. The Provincial Court is an inferior court. This distinction between superior and inferior courts is a legacy of the English legal system. Superior courts are those with jurisdiction throughout the province, unlimited by subject matter. They are descendants of the English superior courts. The English superior courts possessed an inherent jurisdiction to try cases and provide remedies, and the superior courts of Canadian provinces share this quality. The superior courts may hear any matter, unless expressly prohibited by legislation. Amongst other matters, these courts have the power to review the activities of inferior tribunals (such as Provincial Courts) and administrative agencies.[67]

An inferior court is a court with limited jurisdiction, such as the Provincial Court. As we have seen, these courts typically deal with criminal, family, youth and (in some provinces) small claims matters.[68] They may not hear a matter unless legislation creating them specifically authorizes them to do so.

The distinction between superior and inferior courts has created significant differences in the substantive jurisdiction of the respective courts. It has also affected the attitudes held both by and towards judges themselves. Judges of the superior courts clearly have the larger jurisdiction; they deal with more varied and often more complex matters than their provincially-appointed counterparts. While superior courts define their own jurisdiction, inferior courts are restricted to those matters specifically delegated to them by legislation. As noted earlier, the activities and decisions of inferior courts (i.e. the Provincial Court) are subject to supervision and review by superior courts. The importance of this distinction between what the two types of courts may do is so important that it has given rise to a distinct principle in constitutional law. That is, if a provincially-appointed (inferior court) judge is carrying out a function or exercising a jurisdiction which should be carried out by a superior court judge, then the legislation which authorizes the Provincial Court judge to carry out such a function is unconstitutional.[69]

Superior court judges not only possess greater authority than the judges of inferior courts; they also enjoy a higher status than their provincially-appointed counterparts. As we shall see in a subsequent Chapter on Remuneration, the superior court judges earn higher salaries and receive greater benefits (both in quantum and variety) than our Provincial Court judges. This enhanced status for superior court judges is no doubt due (at least in part) to the fact that provisions regarding their appointment, remuneration and security of tenure are specifically set out in the *Constitution Act, 1867*. No such explicit constitutional protection and privilege exists for inferior court judges.

The absence of explicit constitutional grounding of remuneration, security of tenure and other important matters for provincially-appointed judges, combined with the non-judicial

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[67] *Id.*, at 255-256.

[68] *Supra* n. 67, at 201.

[69] The test for determining if a provincially-appointed judge or tribunal is carrying out a function which should be exercised by a superior court is set out in *Reference Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714 at 728.

origins of the Provincial Court, have resulted in a perception that infer or courts are courts of an inferior status. Such attitudes have precipitated unfortunate tendencies: the regrettable perception of patronage or ulterior purpose in the appointment of provincial judges, the relative underpayment of these judicial officers (relative to federally-appointed judges and even in comparison to provincial judges in other parts of the country), and the view that Provincial Court judges are somehow less qualified than judges of the superior courts. As a result, until recent developments in the law, the actual or apparent independence of the Provincial Court was held in little regard by both governments and the legal profession.

There is no question that the distinction between the two levels of courts has had a negative effect on the attitudes and morale of provincial judges. Their treatment by government suffers badly in comparison to the more generous remuneration and greater respect accorded the federally-appointed judiciary. This can only lead to a judicial perception that neither the Legislature nor the community (including the legal profession) is concerned with equitable and reasonable standards of compensation, tenure and other aspects of judicial independence for the provincial judges. A perception of unfair treatment and lack of respect does more than breed discord; it diminishes the significance and interest with which the judges view their own role. In the end, the judicial system as a whole is weakened.

Clearly, those factors presently diminishing the stature of the Provincial Court cannot be allowed to continue. Therefore, it is of the utmost importance to examine and consider recent developments in the law which bear directly on the independence and impartiality of the judiciary.

2. Independence of Provincial Judges

Superior court judges are guaranteed tenure by the *Constitution Act, 1867* until age 75, subject to good behaviour. Holding office "during good behaviour" means that judges do not serve at the pleasure of the government, and removal from office will take place only if it is shown that the judges are incapable of discharging the responsibilities of their office. This protection is modelled on England's *Act of Settlement* of 1701.

In Manitoba, provincially-appointed judges are also appointed to hold office during good behaviour.[70] This protection of security of tenure is statutory in nature; theoretically, it is subject to amendment (or even repeal) upon subsequent enactments which affect *The Provincial Court Act*. However, it has been argued that:

> . . . though [provincial statutes which provide security of tenure for Provincial Court judges] are ordinary statutory provisions, they are "ordinary" in form only because they are declaratory of basic constitutional principles and traditions.[71]

That is, although the *Constitution Act, 1867* only provides explicit constitutional protection for judges of the superior courts, it does not follow that there was (prior to the adoption of the *Charter of Rights and Freedoms*) no constitutional protection for the security of tenure of other judges in the overall judicial system. Arguably, as a matter of basic constitutional law and tradition (an "unwritten constitution", if you will), security of tenure and salary is not limited only to those judges mentioned in sections 99 and 100 of the *Constitution Act, 1867*.[72] In any event, clearer constitutional protection for judges of inferior courts has arisen as a result of the adoption of the *Charter of Rights and Freedoms* in 1982. Section 11(d) of the *Charter* provides:

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[70]MAN, s. 3(3).

[71]W.R. Lederman, "The Independence of the Judiciary", in *The Canadian Judiciary* (A.M. Linden ed. 1976) 1 at 6.

[72]*Id.*, at 5.

> Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal* (emphasis added).[73]

Although section 11(d) does not explicitly deal with the status of Provincial Court judges, in its recent decision in *Valente* v. *The Queen*, the Supreme Court of Canada interpreted this section as addressing just that.[74] The Court set out the definition of an independent and impartial tribunal. Mr. Justice LeDain, speaking for the Court, stated:

> Impartiality refers to a state of mind or attitude of a tribunal in relation to the issues and the parties in a particular case. . . . [It] connotes absence of bias, actual or perceived. The word "independent" in section 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.[75]

The tests for independence and impartiality are similar. That is, if the tribunal may be reasonably perceived as independent and may reasonably be perceived as impartial, it meets the test of section 11(d). However, the perception must be one of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence. It is not a question of how the court will, in fact, act, regardless of whether it enjoys such conditions or guarantees. That is, independence must be perceived as well as actual.[76]

It should be noted that judicial independence encompasses both individual and institutional independence. The individual independence of a judge is reflected in such matters as security of tenure. The institutional independence of the court or tribunal over which he or she presides is reflected in its institutional or administrative relationships to the executive and legislative branches of government. Both forms of independence must exist in order for a tribunal to be considered "independent" within the meaning of section 11(d) of the *Charter*.[77]

It should also be pointed out that the individual independence of a judge requires that the judge be free from interference not only from the executive but from individuals as well. Therefore, provisions which expose the security of tenure (or other essential aspect of judicial independence) of an individual judge to the whims of another will violate the constitutional guarantee of independence as provided by section 11(d).

In the *Valente* decision, the Supreme Court of Canada set out the minimum standards which must apply to a Provincial Court in order for it to be considered an independent and impartial tribunal. These standards may be summarized as follows:

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[73]*Canadian Charter of Rights and Freedoms*, s. 11(d), being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[74]*Valente* v. *The Queen*, *supra* n. 1.

[75]*Supra* n. 1, at 169-170.

[76]*Supra* n. 1, at 172-173.

[77]*Supra* n. 1, at 171.

1. Security of Tenure[78]

(a) The judge must be removable only for cause related to the capacity to perform judicial functions, subject to an independent review and determination by a process which affords the judge a full opportunity to be heard;

(b) The judge's tenure must be secure against discretionary or arbitrary influence by the appointing authorities;

(c) Tenure may be until an age of retirement, for a fixed term, or for a specific adjudicative task;

(d) A power to re-appoint a judge at retirement age for a further period at the pleasure of the government is inconsistent with the Charter;

(e) A provision that a judge at retirement age may continue to serve, subject to the annual review of senior judicial officers, i.e. the Chief Judge, does not violate the Charter, although it is by no means ideal.

2. Financial Security[79]

(a) The right to salary and pension should be established by law, not subject to arbitrary interference by the Executive in a manner that could affect independence; with regard to pensions, there should be a right to a pension, not one that depends on the favour of the Executive.

(b) It may be preferable that salaries be fixed by the Legislature, rather than the Executive, and be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation (this is not essential for compliance with the *Charter*);

(c) The application of civil service standards to provincial court judges (provided that a right to pensions has been established) does not affect their financial security.

3. Institutional Independence[80]

(a) The judiciary must have control over administrative decisions which directly affect the exercise of the judicial function, i.e. assigning judges, sittings of the court, court lists, allocation of courtrooms and direction of the court staff carrying out these functions;

(b) The Executive's control over such benefits as paid leaves does not interfere with the essential requirements of judicial independence.

The Supreme Court of Canada, in the *Valente* decision, restated the requirements of the *Act of Settlement* model and commented that it (the model) represented what is generally regarded as the highest degree of security of tenure and security of salary and pension.[81] One commentator

[78] *Supra* n. 1, at 179-184.

[79] *Supra* n. 1, at 184-187.

[80] *Supra* n. 1, at 187-192.

[81] *Supra* n. 1, at 176.

has pointed out that the *Act of Settlement* (which was the model for the provisions concerning superior court judges in our *Constitution*) could be an influence on future court reform.[82]

3. Possibilities for Reform: Independence as a Conceptual Link

We have seen that, although there is no explicit provision in the *Constitution* which protects the security of tenure, financial security or institutional independence of Provincial Court judges, section 11(d) of the *Charter of Rights and Freedoms* has been interpreted as requiring, at least, a minimum standard of independence and impartiality for these persons. In this way, independence and impartiality can thus be seen as a common link or conceptual thread between all the issues which will be examined in the course of this review, i.e. appointment, discipline, evaluation, remuneration and so forth. In considering various approaches to these issues, and in suggesting various recommendations for reform, we must be cognizant of the constitutional requirements of independence and impartiality. In the *Valente* decision, the Supreme Court of Canada authoritatively confirmed that Provincial Court judges enjoy security of tenure as a constitutional right. As a result, it will not be necessary to make recommendations with respect to tenure. However, in several other areas, the standards of judicial independence and impartiality set out by the Supreme Court of Canada achieve the bare minimum of constitutional protection and no more. If public confidence in our provincial judiciary is to be maintained, it may be necessary to go beyond these minimum requirements and design new standards which entrench judicial independence and impartiality while at the same time ensuring judicial accountability for conduct which is incompatible with the duties and requirements of that office.

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[82]W.R. Lederman, *Judicial Independence and Court Reforms in Canada for the 1990's* (1987), 12 Queen's L.J. 385 at 389.

CHAPTER 3

APPOINTMENTS

A. INTRODUCTION

In this Chapter, we examine the first and, in many ways, the most important factor in maintaining the actual and perceived independence of the provincial judiciary: the appointment of highly qualified individuals to the Provincial Court in a manner which is concerned solely with the objective determination of merit and which reduces the influence of political considerations.

Unless the public is assured that judges are appointed by means of a consistent selection process with objective enunciated standards, it cannot entirely be blamed for cynically concluding that the process has more to do with politics than it does with merit. Where appointments are seen to be made behind closed doors, the perception will inevitably arise (however unjustly) that appointment to the Bench is a reward for political service. This in turn may precipitate the belief among both the public and the legal profession that Provincial Court judges, having attained their position as a result of the government's favour, are therefore obligated to that government, in a manner which might seriously undermine the independence of the judiciary. The effect on public confidence in the legal system could be corrosive.

A further negative consequence of the perception of political patronage in the appointment of the judiciary is the potential damage to the judiciary's own self-image and morale. A Provincial Court judge who feels that he or she is somehow perceived as "inferior" to judges of higher courts, or that the public regards his or her appointment simply as a political plum unrelated to merit, could begin to experience some doubt as to whether the Provincial Court is inferior not only in a constitutional sense, but in a real sense.

The negative consequences described above flow from a system in which appointments are made in the sole discretion of the Cabinet. Whatever the reality of the situation, such a closed-door, politically-charged method can only result in suspicions of appointments for political or other ulterior motives, rather than for merit. Regrettably, this is the system presently in place in Manitoba. Although a strong tradition has developed that the Attorney General will consult with interested groups, the fact is that there is no body in this province which has been established by legislation either to nominate or review candidates for judicial appointment. Thus, the Attorney General of Manitoba is under no obligation to consult with persons or organizations in the discharge of his responsibility for bringing judicial appointments before the provincial Cabinet. Our legislation simply provides that ". . . the Lieutenant Governor in Council may appoint such persons as he considers necessary as judges of the Provincial Court of Manitoba . . . ."[1] The only requirements for potential appointees which are specified by legislation relate to membership in the Law Society of Manitoba, entitlement to practise and a period of practice or related experience of not less than five years.[2] Aside from these requirements, the appointments under

[1]MAN, s. 3(1).

[2]MAN, s. 3(2).

the present system are solely a matter of executive prerogative, made without reference to other established or publicized criteria.

Although this method of exclusive executive discretion in the selection and appointment of judges to the Provincial Court may meet the minimum standards of independence and impartiality established by the Supreme Court in the *Valente* case,[3] we believe that it represents a serious threat to the independence and perceived independence of the judiciary. Such discretion on the part of government can, and does, lead to the perception that persons appointed to the Bench are being selected for reasons other than those related to their ability to competently and intelligently discharge the duties and obligations of Provincial Court judges. This diminishes public confidence in the judiciary and threatens the judiciary's own self-image.

We have therefore concluded that the present system of appointment of judges to Manitoba's Provincial Court is unsatisfactory and should be replaced. Although we agree that the government, as the elected representatives of the people, should retain the power to appoint provincial judges, that power should be guided by a new mechanism aimed at ensuring that merit is the primary consideration in appointments and making that fact clear to the public. In the remainder of this Chapter, we will consider two fundamentally different approaches to judicial appointment: the review committee and the nominating committee. We will examine the experiences of other Canadian jurisdictions with these approaches and, after considering their respective merits, we will make recommendations for a new system of judicial appointment to be implemented for the Provincial Court of Manitoba.

B. ALTERNATIVE APPROACHES

As noted above, there are two distinct approaches to judicial appointment which we will consider as alternatives to the current system. The two approaches are the review committee and the nominating committee.

Review committees are bodies which are set up specifically to consider and comment upon the names of proposed judges. These names are put before the review committees by the appointing authority (the Attorney General or the Cabinet). Review committees are not authorized to advertise for or recruit candidates, nor do they themselves accept applications or nominations for judicial appointment. In effect, the review committees exist only to consider candidates whom the government would like to see appointed to the Bench. Their recommendations are not binding on the appointing authority and the government is free to ignore their comments and appoint persons who have not been recommended.

Nominating committees are bodies which are created to recruit, screen and recommend candidates for judicial appointment to the appointing authority. Nominating committees are empowered to advertise for and recruit candidates for the Bench. Applications or nominations for judicial office are made directly to the nominating committees, not to the government. Nominating committees thus consider a much wider group of candidates than do review committees, and their procedures are more open to public participation. Nominating committees do not exist solely to assess government-selected candidates. Their recommendations or assessments of candidates are binding on the appointing authority, because the nominating committees prepare and present a list of suitable candidates to either the Cabinet or the Attorney General. The government must then appoint judges only from the names provided to them.

We have attempted to classify the various Canadian jurisdictions as using either review committees or nominating committees. However, this has presented some difficulty, as most

[3] *Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 (S.C.C.).

Canadian jurisdictions use a method of judicial appointment which incorporates aspects of both the review committee and the nominating committee approaches. We have therefore attempted to list the jurisdictions under the approach which their procedure most resembles. This is not an exact classification.

We will now consider in more detail the way in which these differing approaches work in other Canadian jurisdictions.

1. Review Committees

Most Canadian jurisdictions make use of review committees in their judicial appointment process. In Alberta, Saskatchewan, Newfoundland, the Northwest Territories and, until very recently, Ontario, this review function is performed by the Judicial Council (the same body charged with the discipline of judges). New Brunswick and Ontario have recently established separate review committees to advise on prospective judicial appointees. This review procedure has also been adopted by the federal government for federally-appointed judges.

(a) The federal judiciary

Judges of the Superior, District and County Courts, as well as judges of the Federal and Tax Courts of Canada are appointed by the federal Cabinet on the basis of recommendations made by the Minister of Justice. The only exceptions are the appointments of the Chief Justices of such courts, which are the prerogative of the Prime Minister. Beginning in 1973, the Minister of Justice was assisted in the making of recommendations for appointments by a Judicial Affairs Advisor, whose principal job was to accumulate information on potential candidates for the Bench and to communicate with the provincial and territorial administrations on prospective appointments.[4]

For a number of years, the names of potential candidates for judicial appointment to these courts were forwarded to the Minister of Justice or to the office of the Judicial Affairs Advisor in a very haphazard way. Some candidates approached the Minister personally, while other candidates were proposed by lobby groups, influential friends, judges or by the heads of provincial Law Societies. However, the vast number of candidates for appointment were sought by the Minister's office, as opposed to applying directly.[5] Consequently, the process seemed to operate by the funnelling of candidates' names through political channels. The procedure appeared to permit access or serious consideration only to those candidates with the right contacts or friends with the right contacts. That is, the process was susceptible to patronage.[6]

The problems associated with the federal appointments procedure resulted in important changes being introduced to the system in 1988. At the heart of these changes was the establishment of Appointment Review Committees in each of the provinces and territories. Each committee is to include a member of the appropriate Law Society, a member of the appropriate Branch of the Canadian Bar Association, a puisne judge of one of the federally-appointed courts, a nominee of the appropriate Attorney General or Minister of Justice and a nominee of the federal Minister of Justice.[7]

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[4]Canadian Bar Association, Committee on the Appointment of Judges in Canada, *Report* (1985) 11.

[5]L.A. Vandor, "The Appointment of Judges in Canada" (1986), 7 Advocates' Q. 129 at 131.

[6]*Supra* n. 4, at 9; Recommendations of Canadian Association of Law Teachers (CALT) Special Committee on Judicial Appointments, *Judicial Selection in Canada* (1987) 202.

[7]The federal Government has announced that in each case, its nominee will be a person, other than a practising lawyer, capable of representing the public interest: Canada, Department of Justice, *A New Judicial Appointments Process* (1988) 12.

These committees will review the suitability and qualifications of every candidate and advise the Minister of Justice as to which candidates should be appointed. The new committees will meet and collectively consider many more candidates than were previously considered. Furthermore, because the committees are to be permanently constituted, they will be able to review candidates on an on-going basis, before it is necessary for the Minister of Justice to recommend a new candidate for appointment to one of the federally-appointed courts.[8]

As a further consequence of the recent changes, the Office of the Commissioner for Federal Judicial Affairs (which has traditionally performed administrative functions concerning the salaries and benefits of the federally-appointed judges) will now have an additional responsibility. The Commissioner for Federal Judicial Affairs will solicit and maintain records of all those interested in appointment to a federal judicial position. To assist in the recruitment of candidates, there is to be wide publicity of the vacancies, the need for nominations and the fact that all persons whose names are suggested will be fully investigated and considered by the appropriate review committee.

Persons who are interested in appointment to one of the courts staffed by federally-appointed judges will be required to complete a standard information form and to submit any additional information which they wish to have before the review committee when it considers their qualifications. The committee will have the option of supplementing this information with interviews of the candidates, if it so wishes. The candidates will have to satisfy the review committee that they are "qualified" to be considered for appointment, taking into account the elements of merit set out in a booklet recently issued by the federal government. This booklet provides that:

> . . . The primary qualification for appointment to the Bench must be merit, defined to include the following considerations: proficiency in the law; a well-rounded legal experience; maturity and objectivity in judgment; evidence of human qualities indicating that the judge would be receptive to and appreciative of social issues arising in litigation; the capacity to exercise the larger policy role conferred upon the judiciary by the Charter of Rights and Freedoms. As well, the ideal of public service should be a prime motivation for candidates for judicial office.[9]

The final decision as to appointment remains in the hands of the Minister of Justice.

(b) New Brunswick

New Brunswick, like the federal government, has also recently introduced an experimental consultative process. Under this new process, all persons wishing to apply for appointment to the Provincial Court must complete a standard information form, available from the Department of Justice. Nominations of persons for appointment will also be accepted. All application forms and nominations for judicial appointment are to be sent directly to the Deputy Minister of Justice, who will conduct a preliminary screening of all applicants and nominees to determine whether the technical requirements for judicial office (as prescribed by the legislation) are satisfied. The Deputy Minister will then confirm that the nominee wishes to let his or her name stand for assessment. The name of each person meeting all of these requirements will then be forwarded, whenever there is a vacancy on the Bench, to the Judicial Appointment Review Advisors for assessment.

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[8] *Id.*, at 8.

[9] *Supra* n. 7, at 5.

The central feature of the New Brunswick system is the requirement for formalized consultation with the province's Judicial Appointment Review Advisors. There are to be eight advisors, of whom:

- one shall be a nominee of the Law Society of New Brunswick;
- one shall be a nominee of the Provincial Branch of the Canadian Bar Association;
- one shall be a nominee of the Association des juristes d'expression française du Nouveau-Brunswick;
- one shall be a puisne judge of the Court of Appeal of New Brunswick nominated by the Chief Justice of New Brunswick;
- one shall be a puisne judge of the Court of Queen's Bench nominated by the Chief Justice of the Court of Queen's Bench of New Brunswick;
- one shall be a judge of the Provincial Court of New Brunswick nominated by the Provincial Court Judges Association;
- two (who shall not be lawyers) shall be nominees of the Minister of Justice.

The advisors will be appointed for a two-year term, with possibility of re-appointment for a further term of two years.[10]

The Deputy Minister of Justice will submit to each of these advisors the names of all persons who meet the technical qualifications for appointment, together with the biographical or other information which has been compiled by the Minister's office on these candidates. Evaluations of each candidate by each advisor will then take place. The advisors do not meet as a group; instead, they are expected to consult others within the constituency that they represent as to the qualifications of the candidates (e.g. representatives of the Bar would consult other lawyers). The candidates will be evaluated on the following essential qualities:

- high moral character;
- human qualities: sympathy, generosity, charity, patience;
- experience in the law;
- intellectual and judgmental ability;
- if bilingual, the level of second language competence;
- good health and good work habits.[11]

Each candidate will be rated under one of three headings: "highly acceptable", "acceptable" or "otherwise". The evaluations will then be returned to the Deputy Minister for tabulation. If a candidate is rated as "otherwise", the advisor who has provided this assessment must be prepared to provide reasons. Furthermore, if an advisor's comments are contrary to

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[10]Press Release, Government of New Brunswick, "The New Judicial Appointments' Review and Consultation Process" (October 7, 1988) 4.

[11]*Id.*, at 5.

information received from other sources, the Minister will have the right to ask the advisor to provide reasons for the assessment or to reassess a particular candidate. Finally, if a candidate is rated as "otherwise", he or she will have the right to request the reasons for that rating. Therefore, the candidate will have the opportunity to correct any mistakes of fact that may have affected the assessment, by submitting responses to the assessment to the Deputy Minister.[12]

During periods when there are no vacancies on the provincial Bench, the names of all candidates who have applied and been assessed will be retained in a data file. Any person included in this file for prospective appointment will be eligible for consideration for a period of two years from the date of the assessment. Upon the expiry of this two year period, the Deputy Minister of Justice will contact the applicant or nominee to determine if he or she is still interested in appointment. If the candidate is still interested, the advisors will be asked to provide an updated assessment for that person.[13]

When a vacancy does arise, the Minister of Justice will select for final consideration the names of prospective appointees from those in the data file. These individuals will then be interviewed by a committee composed of the Chief Justice of New Brunswick, the Chief Judge of the Provincial Court and one of the two lay people serving as a Judicial Appointment Review Advisor. This interview committee will again rate the candidates as "highly acceptable", "acceptable" or "otherwise".[14]

Despite the apparent formality of this system, the Minister of Justice will continue to oversee the selection process for Provincial Court judges in New Brunswick and will bear ultimate responsibility for the process. The Minister retains the right to recommend an appointment to the Lieutenant Governor in Council, regardless of a negative assessment of that candidate by one or more of the advisors. The Lieutenant Governor in Council retains the unfettered discretion to appoint Provincial Court judges, even where the persons appointed were not recommended by the review advisors.

(c) Ontario

In mid-December of 1988, the Ontario government announced the formation of the Attorney General's Committee on Judicial Appointments. This program is to be a three year pilot project.[15]

The new advisory committee has a mandate to advertise judicial positions[16] and to consider any and all names for judicial appointment from any source. The committee is required to ascertain the qualifications of prospective appointees to all Provincial Court judgeships and, upon the occurrence of a vacancy, to make recommendations to the Attorney General for filling it.

Representatives of the public have been given a large role in choosing judges under this plan, since two-thirds of the nine committee members are not lawyers. Seven of the members of the committee are appointed by the Attorney General (including the Chairman); included in this group are the six non-lawyers. The other two members of the committee are a Provincial Court

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[12]*Supra* n. 10, at 4.

[13]*Supra* n. 10, at 3.

[14]*Supra* n. 10, at 4.

[15]Statement to the Legislature by the Honourable Ian Scott, Attorney General on the Attorney General's Advisory Committee on Judicial Appointments, December 15, 1988, reproduced in (1989, No. 1), 13 Prov. Judges J. 13.

[16]*See e.g.*, the advertisement placed by the Committee in *The Lawyers Weekly*, April 14, 1989, 22.

judge designated by (but not from) the Ontario Judicial Council and a lawyer designated by the Law Society of Upper Canada.[17]

Ontario's legislation still requires that the Judicial Council consider a candidate before he or she can be appointed to the provincial Bench.[18] Accordingly, this new Committee on Judicial Appointments will complement, rather than displace, the role of the Judicial Council. The Judicial Council will continue to exercise its statutory responsibility to assess candidates for the provincial Bench.

As in New Brunswick, the Attorney General of Ontario still maintains control over the selection of Provincial Court judges. He or she will continue to make the ultimate decision on whom to recommend to the Lieutenant Governor in Council for appointment to the Bench, irrespective of the recommendations of the Judicial Council or the Committee on Judicial Appointments.[19]

(d) Other jurisdictions

Rather than creating special advisory committees, several Canadian jurisdictions employ their Judicial Councils to review (and recommend) candidates for judicial office. The jurisdictions which use this approach are Alberta, Saskatchewan, Newfoundland and the Northwest Territories.

In Alberta, the Lieutenant Governor in Council is given the discretion to appoint judges to the Provincial Court.[20] However, the Judicial Council's mandate provides that it shall consider the proposed appointment of persons as judges and report their recommendations to the Attorney General.[21] The legislation does not, however, require that the Attorney General recommend for appointment only those candidates who were endorsed by the Judicial Council.

In Newfoundland, the Lieutenant Governor in Council, upon the recommendation of the Minister of Justice, may appoint such fit and proper persons as he or she considers necessary to be judges of the Provincial Court.[22] In making such recommendations, the Minister is required to consult with the Judicial Council when deciding upon the recommendations for judicial office.[23] However, the Minister is not bound by the comments of the Judicial Council.

In Saskatchewan, the Lieutenant Governor in Council again has the discretion to appoint any persons whom he considers necessary as judges of the Provincial Court.[24] The Judicial

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[17]*Supra* n. 15. University of Toronto Political Science Professor Peter Russell has been named Chairman of the Ontario Advisory Committee. The other lay members are author and former *Globe and Mail* columnist Michele Landsberg of Toronto; Valerie Kasurak, a former citizenship judge; Bob Muir, Executive Director of the Lake of the Woods District General Hospital in Kenora; Ben Sennik, a North York businessman; and Rev. David McCord, a former prison chaplain from Ottawa: "The Judicial Appointments Advisory Committee, December, 1988" (1989, No. 1), 13 Prov. Judges J. 17.

[18]ONT, s. 58(1).

[19]Attorney General Ian Scott said he is not prepared to commit himself in advance to choosing only those judges approved by the advisory committee, but that he is ". . . entirely confident that the view of the committee will be accepted by me.": C. Schmitz, "Judicial Appointment Advisory Body Won't Be Political, Ontario A.G. Says", *The Lawyers Weekly*, February 19, 1988, 1 at 9.

[20]ALTA, s. 2(1).

[21]ALTA, s. 11(1)(a).

[22]NFLD, s. 7(1).

[23]NFLD, s. 7(1).

[24]SASK, s. 5(1).

Council is directed to consider and make recommendations to the Minister of Justice regarding proposed appointments, but these recommendations are not binding; they are advisory only.[25]

Finally, in the Northwest Territories, the Commissioner of the Territories is given the discretion to appoint such qualified persons to be territorial judges as he considers necessary.[26] Once again, the Judicial Council is directed to consider and recommend to the Commissioner candidates for appointment as both territorial judges *and* as the Chief Judge of the Territorial Court; again, these recommendations are not binding.[27]

2. Nominating Committees

Two Canadian jurisdictions, Québec and British Columbia, make use of nominating committees in their judicial appointment process. A third jurisdiction, the Yukon Territory, uses a procedure which is a variation of the nominating committee approach.

(a) Québec

The method by which Québec recruits and selects its judges is set out in considerable detail in a regulation under the *Courts of Justice Act*.[28] This regulation requires the Minister of Justice to establish a selection committee each time a judicial vacancy occurs. The regulation empowers these committees to consider the qualifications of all candidates, and to provide the Minister with their views on the candidates they consider apt for appointment. It also gives all persons meeting the legal requirements for appointment the right to submit themselves as candidates for the selection procedure. As well, every citizen and each section of the Bar has the right to submit, in writing, names for candidacy. The regulation also gives the candidates the right to appear before the committee and the right to confidentiality.[29]

Each selection committee has three members. The first is a judge of the court in which there is a vacancy,[30] appointed on the recommendation of its Chief Judge. The other two are appointed by the Minister of Justice; one is to be a lawyer (named after consultation with the Bar) and the other is to be a member of the public who is neither a judge nor a lawyer.

Generally speaking, the selection process (invoked once a judge is to be selected or six months prior to a known vacancy) consists of four stages. The process begins with the publication by the Minister of Justice of a notice of the vacancy in the journal of the Barreau du Québec or other newspaper inviting interested persons to submit their candidacy or propose the candidacy of another.[31]

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[25]SASK, s. 16(1)(a).

[26]NWT, s. 4(1).

[27]NWT, s. 31(1)(a).

[28]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5.

[29]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, ss. 15-17.

[30]Before the recent provincial court unification, the provisions applied to the Provincial Court, the Court of the Sessions of the Peace, the Youth Court and the Municipal Courts of Laval, Montreal and Québec. As a result of the establishment of the Court of Québec, these courts and the corresponding expressions "Provincial Court", "Court of the Sessions of the Peace" and "Youth Court" have now been replaced by the expression "Court of Québec". *See An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec*, S.Q. 1988, c. 21, s. 66, which was ordered in force August 31, 1988.

[31]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 2.

Applicants submit their candidacy by forwarding to the co-ordinator designated under the Regulation a curriculum vitae which, in addition to the name, address, telephone number and date of birth of the applicant, must include a recent photograph, date of admission to the Bar, proof of entry on the roll of the Barreau du Québec (or reason for lack thereof), number of years of practice, and the principal areas of law in which he or she has concentrated. If the candidate has not practised as a lawyer for at least ten years, he or she must also indicate the nature of the professional activities by which the pertinent legal experience has been obtained. Where applicable, the names of employers over the last ten years must also be indicated, as well as any disciplinary decision rendered against him or her and the nature and reasons for such decisions. Finally, each file must contain a statement summarizing the candidate's reasons for seeking appointment to the judiciary.[32]

Before forwarding the names of all applicants and their files to the appropriate selection committee, the coordinator is required to verify this information and, where the nomination is from someone other than the candidate, to obtain the necessary consent to process the application.[33] Verification is sought both from the Bar and law enforcement authorities; a candidate is deemed to have accepted that an investigation will be carried out.[34]

Committees must meet and interview all candidates.[35] An important procedure intended both to protect the privacy of candidates and to eliminate outside pressure on the committees is the requirement that these meetings be held in private without any publicity.[36]

The committees are required to determine the competence of each candidate for appointment as a judge. For that purpose, they assess the personal and intellectual qualities of each candidate, as well as his or her experience. In particular, the regulation requires that committees evaluate the candidate's degree of legal knowledge in the areas of law in which the judge will perform his or her duties, capacity for judgment, insight, ability for evaluation, sense of decision, and concept of a judge's duty.[37]

Following the completion of its assessment, the committee makes its report to the Minister of Justice. This report must contain the names of candidates that the committee has interviewed and that it considers suitable for appointment as judges.[38] Any member of the committee is entitled to dissent from the report or any portion thereof[39].

The coordinator must then write to all of the applicants interviewed to advise them that the committee has completed deliberations and submitted its report. Applicants are also notified that the decision with respect to their applications will remain in effect for twelve months (from the date of the notice of the competition).[40] Since the regulation stipulates that the names and all

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[32]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 5.

[33]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 6.

[34]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 7.

[35]If an interview cannot be arranged, the committee must indicate this in its report to the Minister and give the reasons why: *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 15.

[36]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 17.

[37]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 18.

[38]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 20.

[39]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 21.

[40]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, ss. 22 and 23.

information relating to applicants are confidential, all of the files assembled on the applicants are retained by the coordinator. As a final safeguard, the candidates themselves are denied access to this information and to the decision of the committee.[41]

The commentators disagree on whether the Minister is obliged to select a judge from the names put forward by the committee.[42] However, the Regulation does provide that:

> If the Minister is of the opinion, after having received the report of a committee and having taken into account the list of persons apt for appointment as judges of a court, that he cannot, in the best interest of justice, recommend an appointment, he may publish another notice . . . .[43]

A second notice of the vacancy must then be published as before. The Committee that made its report following the first notice must then call the persons who have submitted their candidacy in response to the second notice and report to the Minister in accordance with the regulation. Since a candidate may not re-apply for the twelve month period during which the decision of the committee as to his competence is valid, it appears that the Minister cannot use this procedure to oblige the committee to reconsider a candidate. Whether or not he is legally required to do so, the practice apparently has been for the Minister of Justice to make his appointments from the first list of names which the committee supplies.[44]

(b) British Columbia

The source of all suggestions to the Attorney General for appointment in British Columbia is its Judicial Council. The Council consists of nine members, of whom four are appointed by government and five are either judges with tenure or lawyers designated by the Law Society of British Columbia or the Canadian Bar Association.[45]

To be considered for appointment to the British Columbia Provincial Court, candidates apply in writing directly to the Judicial Council which (as with the Committee in Québec) will then interview each applicant who meets the statutory requirements. The candidates also provide a recent photo, medical certificate and additional personal information as required.[46]

Before the interview of an applicant, the Judicial Council will gather information from the Law Society of British Columbia and the Canadian Bar Association on a formal basis and will also gather information informally from justices, judges and other persons who are likely to have

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[41]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 27.

[42]One commentator suggests that the appointment of a candidate not recommended by a committee may be illegal: P. Garant, "La sélection des juges provinciaux au Québec", CALT Special Committee on the Appointment of Judges, *Judicial Selection in Canada* (1987) 94 at 101. *But see* P.H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (1987) 130:

> The Minister is still not bound by law to select judges from the names recommended by nominating committees, although M. Bédard, who served as Justice Minister until 1984, committed himself to choosing only persons recommended by committee.

[43]*Regulation respecting the procedure for the selection of persons apt for appointment as judges*, R.R.Q. 1981, c. T-16, r. 5, s. 26.

[44]The Minister's accountability is limited here by the obvious fact that only the members of the committee and the coordinator would ever be aware of the contents of the report and of the names submitted by the committee as apt for appointment. Contrast this with the current situation in 20 of 35 American nominating commission plans which release the names of all approved (recommended) nominees they submit to the appointing authorities. In this way, both applicants and the public can see which three to five applicants were found to be best qualified, and the appointing authority is made accountable for the exercise of its discretion.

[45]BC, s. 12.

[46]Judge L.S. Goulet, "The B.C. Experience in the Appointment Process", CALT Special Committee on the Appointment of Judges, *Judicial Selection in Canada* (1987) 164 at 167.

knowledge of the candidate's suitability for office.[47] After interviewing the candidate, the Council will classify the applicant in one of three categories: "recommended for appointment", "decision deferred" or "not recommended".[48]

Unlike Québec, no criteria for the evaluation of candidates have been established under the British Columbia legislation and no particular policy or guidelines have been developed.[49]

When a vacancy occurs on the British Columbia Provincial Court, the Judicial Council will send a list of candidates who are recommended for appointment, together with supporting material, to the Attorney General for consideration.[50] The British Columbia legislation requires the Cabinet to appoint only persons who have been recommended by the Judicial Council.[51] Therefore, although the Attorney General may be able to require the Council to provide him with a supplementary list or lists of candidates, it would seem clear that only those candidates who have been recommended by the Judicial Council may be brought forward by the Minister to Cabinet for appointment.

(c) Yukon Territory

In the Yukon Territory, too, we find the involvement and approval of the Judicial Council in the appointment process to be required by legislation. Its Act provides:

> The Commissioner in Executive Council, on the recommendation of the Judicial Council, may appoint such judges as he considers necessary.[52]

In setting out the functions of the Judicial Council, the *Act* provides that the Council is to make recommendations respecting the appointment of judges and justices to the appropriate member of the Territory's Executive Council (equivalent to the member of a provincial Cabinet who is responsible for the judiciary).[53] Therefore, although the legislation does not specifically state that the Yukon Territory's Judicial Council is to act as a nominating committee, it does appear to require that the persons to be appointed as judges be recommended by the Council; it seems that the government may only appoint candidates who have been so recommended.

C. ANALYSIS AND RECOMMENDATIONS

In this section, we will review the approaches to judicial appointment which have just been discussed, with a view to determining which alternative is best for Manitoba. Once an approach

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[47] *Ibid.*

[48] *Supra* n. 46, at 167-168.

[49] Information about the process has therefore been based on a few periodical articles and reports which have described it. *See* J.E.C. Brierley, "Provincially Appointed Judges", CALT Special Committee on the Appointment of Judges, *Judicial Selection in Canada* (1987) 85 at 87-88.

[50] There is some confusion as to the number of names which will be submitted by the Judicial Council to the Attorney General. According to one commentator, upon a vacancy occuring, the Council will supply three names from its list of approved candidates to the Attorney General: *id.* at 90. Another commentator suggests that a list of all candidates who are considered appropriate for appointment by the Council is sent to the Attorney General: *supra* n. 46, at 168. Finally, one writer states that the Council "approves considerably more names than there are actual vacancies so that the list it submits leaves the Minister with some discretion in deciding which name to bring forward to Cabinet.": Russell, *supra* n. 42, at 128.

[51] BC, s. 5(1).

[52] YT, s. 7(1). The Judicial Council plays a similar role with respect to part-time judges: YT, s. 7(2).

[53] YT, s. 16(2).

has been chosen, we will then proceed to examine several important issues with respect to the implementation of the new appointment procedure. Guidelines with respect to these issues will then be recommended.

1. Analysis of Approaches

(a) Review committees

The dominant approach currently used in Canada is the review committee. Several advantages have been identified with respect to this process. The government is required to consult with or seek the recommendations of an independent committee. This committee is authorized (or even required) publicly to recruit candidates for judicial office. Therefore, the review process has the potential, if properly implemented, to be a system which is visible, open to the public, accessible to a broad range of qualified candidates and able to evaluate the candidates in a more impartial manner than was previously the case. The nomination or submission of applications for judicial office would not be a "closed door" process; the visibility of the committee and the publicity of the vacancies and of the appointment process are measures which should counteract both the reality and the perception of political patronage in the appointment process.

The review committee approach also offers public participation; the committees usually provide for lay membership and for the public recruitment of candidates. In this sense, the process has the potential to ensure that public expectations concerning the judiciary are influential and that attributes beyond legal qualifications of a good candidate are recognized.

Unfortunately, there are a number of important disadvantages associated with the review process which undermine its effectiveness. If the government is given the power to appoint the majority of the members of this committee, there is the risk that the process may simply operate as a "rubber stamping" of candidates who are put forward by the government. More significantly, these committees operate in an advisory capacity only. There is nothing in the process to prevent a government from filling the Bench with its own preferred appointees. Even though the Minister is required to take the committee's assessments into account, he or she will do so together with the results of other consultations which may have been conducted (either by the Minister or on his or her behalf) and such additional factors as the government considers important (for example, the desire to appoint a candidate from a certain minority group, or from a certain area of the province). Furthermore, the Minister typically reserves the right to recommend an appointment contrary to the advice received from the committee where the Minister deems it appropriate to do so. Thus, if the government is required merely to consult with the committee, it may choose to appoint a candidate who has not been approved (or who only received lukewarm approval) by the committee. If the committee operates solely as a body which considers candidates put forward by government, the government could simply stock the candidate list with political friends until it selects a name which even the committee cannot refuse. That is, the government would keep referring names which it has selected to the committee until one is accepted.

Since the review committee approach does not prejudice the right of the Minister to appoint a candidate regardless of a negative assessment by the committee, this may seriously undermine the advantages identified earlier. The following remarks respecting the review committee system of judicial appointment are appropriate here:

> However, all these observations only indicate that the only method of appointing to the Bench that is successful is where you have a thoughtful conscientious Minister of Justice. If he is determined to use people like Ed Ratushny [the first Judicial Affairs Advisor in the federal

> appointments process] to get all the information he can, we will have good judicial appointments. Once politics enters into it, we will not. It is as simple as that.[54]

(b) Nominating committees

Like the review committee approach, the use of nominating committees brings objective merit as the selection criterion to the fore. However, the key advantage of the nominating committee is that it does this in a truly meaningful fashion. Such a committee publicly advertises for applicants and its recommendation has binding effect. The Attorney General may select appointees only from its list; he or she may not ignore the views of the committee. This characteristic of the nominating committee approach directly addresses perceptions of political patronage. A properly constituted committee will address concerns that non-legal perspectives will also be considered in the appointment process.

Such important advantages can only enhance the public's confidence in the independence and impartiality of the judiciary. As one commentator has noted:

> A Nominating Commission . . . changes the flavour and the assumptions of the recruitment process right from the beginning. The eventual results - in terms of individual appointments - may not show statistically significant differences, but the way we look at the process will surely be altered.[55]

The advantages and effectiveness of the nominating committee process have been recognized by various commentators and groups. For example, in its 1985 Report on the appointment of judges, the Canadian Bar Association examined the work of all of the bodies in Canada then having the responsibility for advising or recommending judicial appointments. According to its findings, some of these bodies had produced such significant improvements in the quality of judicial appointment that politics had virtually been removed from the process. In reaching its conclusions, the CBA Report identified several features which, in its opinion, would most likely result in the successful operation of Judicial Councils or committees with respect to judicial appointments:

- Three constituencies - the Bench, the Bar and the general public - should be represented on these Councils or committees;
- The Judicial Council or selection committee should consider candidates from many sources, not only those proposed by the provincial Attorney General or Minister of Justice;
- Councils and committees should also seek out candidates actively and inquire into and assess their qualifications;
- The provincial Attorney General or Minister of Justice should select a name from the list provided or, failing that, return to the Council or committee for further recommendations.[56]

The essence of the CBA recommendation is that in each jurisdiction an independent body, external to the Attorney General and Cabinet, should have the power to deliberate on prospective

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[54] J.J. Robinette, "Comments on Judicial Appointments", *Canadian Judiciary* (A.M. Linden ed. 1976) 48 at 51.

[55] C. Baar, "Judicial Appointments and the Quality of Adjudication: The American Experience in a Canadian Perspective" (1986), 20 R.J.T. 1 at 17.

[56] *Supra* n. 4, at 68-69.

nominees *before* they are presented to the responsible Minister or Cabinet for possible appointment. Of particular significance is the further recommendation that the Attorney General or Cabinet should be obliged by law to choose for appointment only from the names so submitted. In short, the nominating committee approach was recommended. The Committee's conclusion was that these improvements would raise judicial selection procedures in all provinces and territories to the standard established by British Columbia and Québec.[57]

Of course, the process of merit selection through the use of nominating committees has not been free from criticism. The primary argument presented by its critics has been that the use of such bodies diffuses or detracts from the public accountability that the Cabinet and the Minister (as our elected representatives) now have for the quality of these appointments.[58] It is argued that the present system may on occasion result in a bad judge, but at least the persons responsible for such an appointment are accountable and may, in due course, be punished by the electorate (this of course assumes, perhaps naively, that the public is sufficiently interested and informed that it will be prepared to vote out a government for a poor judicial appointment).

Critics also argue that, although nominating committees may reduce the importance of partisan considerations, they cannot eliminate the influence of partisan politics from the selection process and may introduce Bar politics to the process. For example, the practice of having the Attorney General appoint lay members to the nominating committees has been criticized as an invitation for political machinations.[59] Indeed, American experience suggests that party affiliation still plays a role in appointments under a nominating commission framework.[60] In Canada, Peter McCormick examined the composition of all of the provincial Judicial Councils and found a definite and strong partisan connection between the government and those persons it tended to appoint as lay members.[61] However, it should be noted that the members of the councils themselves felt that the government had not attempted to abuse this connection.[62] Excessive representation of lawyers on the nominating committees may introduce elements of coziness or elitism of the organized Bar.[63]

It is true that the composition and evaluation procedures of nominating committees raise difficult questions. Nominating committees cannot entirely exclude politics (whether partisan or otherwise) from judicial selection. On the other hand, even though there are difficulties associated with the process, this is not sufficient reason to ignore its value. Any system which imposes standards of competence and which allows healthy competition for judgeships is to be preferred over the present system which has no enunciated standards. Taking into account the above principles and drawing from the previous analysis of how the nominating committee approach has operated in British Columbia and Québec, it is possible to isolate and address most

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[57]*Supra* n. 4, at 69.

[58]Remarks by the Honourable E.D. Fulton, P.C., Q.C. in *Law, Politics and the Judicial Process in Canada* (F.L. Morton ed. 1984) 75.

[59]A. Ashman and J.J. Alfini, *The Key to Judicial Merit Selection: The Nominating Process* (1974) 25.

[60]*Supra* n. 55, at 10.

[61]P. McCormick, "Judicial Councils for Provincial Judges in Canada" (1986), 6 Windsor Year B. Access Justice 160 at 164.

[62]*Id.*, at 165.

[63]The problem posed by Bar politics is not necessarily one of elitism. The members of a committee who are lawyers usually occupy some official position in a Law Society or have some other Bar affiliation. As such, in their deliberations on the nominating committee, they are routinely confronted with a basic conflict - do they vote as individuals or as members of the Bar? The risk of internal Bar politics has been viewed as influencing the functioning of the Ontario Attorney General's Judicial Appointments Advisory Committee. According to one news report, the Law Society of Upper Canada has fired its nominee on the Appointments Committee on the grounds that the views he expressed to the Committee about the criteria for judicial appointment were biased, and did not represent the view of the Law Society's larger membership: M. Valpy, "Lawyers Committee Can't Handle Bias", *The Globe and Mail*, February 24, 1989, A8; M. Valpy, "Ontario Courts System Could Use Overhaul", *The Globe and Mail*, February 27, 1989, A8.

of the issues which would need to be considered if this procoedure were to be adopted in Manitoba. The criticisms of this process do not surmount its principal advantage: the fact that it is the committee which recruits, reviews and recommends to the government the candidates for judicial office. The government can only appoint to the Bench one (or more) of the candidates recommended by the committee. While the committee plays the crucial role of ensuring that all appointees are meritorious, the government retains the actual power of selection from a pre-screened list. Both the goals of merit and accountability are served. In our view, this process should be adopted in Manitoba.

We recommend:

RECOMMENDATION 1

That The Provincial Court Act be amended to provide that judges be appointed by the Lieutenant Governor in Council from a list of names provided to the Attorney General by a nominating committee.

2. Implementation

The balance of this Chapter considers various issues relating to the implementation of our recommendation that provincial judges be appointed from a list of names prepared by a nominating committee.

(a) Composition of nominating committee

Of critical importance to the success of the new appointment procedure which we propose is the composition of the nominating committee. Should Manitoba's Judicial Council (which is responsible for disciplining provincial judges) also act as this province's nominating committee (as is the case in several other Canadian jurisdictions)[64] or should a separate group be constituted for the purpose?

The major advantage of using Manitoba's Judicial Council as our nominating committee is convenience. The Judicial Council is already in existence, has a well-defined membership, and commands the respect of the public. Furthermore, it may be argued that familiarity with the discipline problems of judges will give the members of the Judicial Council a shrewder insight into the characteristics which should be sought in judicial recruits.[65] The Canadian Bar Association agreed that Manitoba should empower its Judicial Council to recommend provincial judicial appointments.[66]

However, in our view, it would be inappropriate to require the Judicial Council to undertake a role in the appointment process and then be faced with the prospect of ordering disciplinary sanctions against a judge whom they may have recommended for appointment. Furthermore, the appointment of judges and the disciplining of judges are very distinct functions;

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[64]Judicial Councils play a role in the appointment process, either as a review committee or as a nominating committee, in British Columbia, Alberta, Saskatchewan, Newfoundland, the Northwest Territories and Ontario.

[65]*Supra* n. 42, at 130.

[66]*Supra* n. 4, at 69. In the case of Manitoba and Nova Scotia (two jurisdictions with already established Judicial Councils not having mandates to participate in the appointment process), the report recommends amendments that would empower the Council to recommend provincial judicial appointments.

different considerations, calling for different perspectives, apply to each. We therefore recommend:

RECOMMENDATION 2

That the nominating committee not be the Judicial Council.

In our view, a separate group should be constituted to act as the nominating committee for the Provincial Court. Its membership and method of operation should be designed to eliminate any reasonable perception of a closed-door, politically motivated process; care must be taken to ensure that considerations of partisan politics are not simply replaced with the politics of another group (such as the legal profession). This is best achieved with a group comprised of persons representing varied points of view. No one point of view should predominate.

Certainly, the practising Bar and the provincial judiciary should be represented on this committee. However, they do not have a monopoly on the ability to appreciate and assess the qualities desirable in an appointee. For example, we believe that it would be beneficial to have the perspective of an individual who is versed in the law, yet who cannot be seen as representing the interests of the legal profession. We believe that a full-time member of the Faculty of Law of the University of Manitoba, elected by the Faculty Council, would bring to the process a knowledge and appreciation of the needs of the Provincial Court without being encumbered by the understandable self-interest of practitioners.

More importantly, non-lawyers should play a role in the process. While they may not be able to assess the legal acumen of candidates, they are certainly as capable (and perhaps more capable) of assessing important human qualities such as common sense, compassion and integrity.

We recommend:

RECOMMENDATION 3

That each nominating committee should be composed of 5 persons:

(a) two should be named by the Lieutenant Governor in Council and should not be lawyers, judges or retired judges;

(b) one should be a Provincial Court judge, named by the judges of that Court;

(c) one should be a full-time member of the Faculty of Law of the University of Manitoba, elected by the Faculty Council; and

(d) one should be jointly named by the President of the Law Society of Manitoba and the President of the Manitoba Branch of the Canadian Bar Association.

It should not be necessary to have a permanently established nominating committee; the number of appointments required in Manitoba do not justify it. Furthermore, the perception of an entrenched appointing body should be avoided and new perspectives should continually be brought into the appointment process. For these reasons, we feel that a committee should be appointed on an *ad hoc* basis whenever a vacancy occurs or is anticipated in the Provincial

Court. The government should select a chair for each committee from amongst its five members. We recommend:

RECOMMENDATION 4

That a nominating committee should be appointed on an ad hoc basis each time a vacancy on the Provincial Court occurs or is anticipated.

RECOMMENDATION 5

That the chair of each nominating committee should be named by the Lieutenant Governor in Council from among its members.

(b) Recruitment and evaluation of candidates

As part of the opening up of the appointment process, we believe that it is essential that the availability of vacancies on the Provincial Court be widely publicized and that the largest number of qualified candidates be encouraged to come forward. Although it may well be that "Bar folkways dictate that you be asked to be a judge rather than overtly seeking the position",[67] we hope that such attitudes will change in the face of a visible, merit-based appointment process.

In New Brunswick, Ontario and Québec, vacancies on the Bench are publicized through advertisements seeking applicants for the position.[68] We believe that this is the best method for ensuring that candidates come from many sources and not just from an "old boy's network". At the same time, individuals (whether lawyers or not) should be free to nominate candidates for judicial office (subject, of course, to the requirement that the nominee must consent to allow his or her name to stand). It is our hope that this will greatly open up the process, as well as address the concerns of those too embarrassed to apply directly. Finally, to ensure that the best candidates come forward, the nominating committee itself should be free to seek out and recruit any eligible persons who, in its opinion, would be suitable candidates for the Provincial Court. The nominating committees should not be limited to passively receiving applications or nominations; they should be able to actively encourage applications from those persons who, they believe, would improve the quality of Manitoba's judiciary.

We recommend:

RECOMMENDATION 6

That the nominating committees should be required to advertise for candidates for the vacancy to be filled.

RECOMMENDATION 7

That the nominating committees should be entitled to receive nominations for vacancies, so long as the nominee consents to his or her nomination.

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[67] R.A. Watson and R.G. Downing, *The Politics of The Bench and The Bar* (1969) 65.

[68] Although vacancies on federally-appointed courts are not advertised in newspapers, potential candidates are invited to apply for future vacancies. For example, in early 1988, the federal Department of Justice sent guidelines and application forms for the new appointment process to thousands of lawyers across Canada.

RECOMMENDATION 8

That the nominating committees be entitled to seek out and recruit candidates for vacancies.

Perhaps the most difficult issue relating to the appointment of judges is the determination of the criteria upon which they are to be selected. The nominating process which we propose can only gain public acceptance and respect if specific selection criteria are chosen and publicized. However, the enunciation of clear and objective standards is not an easy matter. The writers who have studied the question have found it easy to agree that honesty, competence and impartiality are indispensable judicial qualities.[69] However, there is considerable uncertainty as to the way to articulate and measure the amount of any given virtue, and as to how to structure the evaluation of candidates in the selection process.[70]

In an effort to give clearer guidance to judicial nominating commissioners and others considering the adoption of merit selection of judges across the United States, the American Judicature Society has identified nine criteria for evaluating candidates for state and federal judgeships.[71] These standards cover physical and mental abilities, professional skills and other special qualities that should be required of judicial candidates, and have become part of the Institute for Judicial Nominating Commissioners' program developed by the American Judicature Society to help commissions better understand and perform their role of choosing judges. To this end, the Society has prepared a Handbook for Judicial Nominating Commissions which includes approximately 150 questions which have been formulated to assist in the identification of the nine evaluative criteria and for use when screening and investigating candidates, designing questionnaires and interview questions and during final selection of nominees.[72]

While it is possible to suggest a number of questions which, if answered, could be useful in determining whether or not a person possesses certain virtues, it should be clear that many of these qualities are intensely personal ones and often their presence or absence is not easily discerned by others. As a result, other evaluative procedures have found it useful to focus on the undesirable (as opposed to the desirable) attributes which would disqualify a prospect for judicial office. For example, the following process has been suggested:

> The criteria of personal virtue should be used as bases for veto rather than as standards for selection. A lawyer should not be appointed on a showing or assumption (for want of contrary proof) that he has all the honesty virtues, but he definitely should be rejected if there is credible evidence that he lacks any of them. Merit selection would then involve two steps. The first would be to veto any prospects lacking the essential virtues and the second to apply the important objective criteria to choose the best qualified among those who possess the basic virtues.[73]

Regardless of the process, once the factors to be used in the rating of candidates have been pinpointed and the question of whether or not to articulate them in the implementing legislation is answered, the problem of the nominating committee will be that of evaluation. It is not easy to recognize the existence or the degree of any given quality in a candidate. Once pinpointed, various attributes would (and arguably should) carry differing weight with each member. Yet

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[69]S. Lowe, *Resource Materials for National Conference on Judicial Selection and Tenure* (1974).

[70]M. Rosenberg, "The Qualities of Justices: Are They Strainable?" (1966), 44 Texas L. Rev. 1063 at 1080.

[71]American Judicature Society, *Report of the Committee on Qualification Guidelines for Judicial Candidates: A Summary* (1983). Highest on their list of qualities for the trial Bench were these six, slightly paraphrased from the list: moral courage; decisiveness; reputation for fairness and uprightness; patience; good health, physical and mental; consideration for others.

[72]M.N. Greenstein, *Handbook for Judicial Nominating Commissioners* (1985) 67-82.

[73]*Supra* n. 70, at 1080.

the committee has to arrive at a consensus as to which names it will bring forward to the appointing authority for final consideration and selection.[74] Alan Ashman and James Alfini recognized this problem in their comprehensive study of judicial merit selection conducted on behalf of the American Judicature Society in 1974.[75] They proposed that, in order to structure the merit selection process, to ensure the orderly consideration of each applicant and to minimize the possibility that committees would be guided by vague standards and/or improper considerations, the following model procedure should be used. A nominating committee should ensure, as far as possible that:

(a) each applicant is considered fully;

(b) each applicant is fairly compared to his fellow applicants;

(c) every important quality and qualification for potential judges is counted;

(d) the evaluation procedure is routinized;

(e) each commissioner may vote on the basis of an evaluation which was recorded at the time it was made and which is preserved in order to form a basis for refreshing his own memory and for discussion purposes; and

(f) subjective impressions of each candidate be recognized as an important but not determinative factor.[76]

In order to accomplish these goals, they recommended a rating system as a possible model for evaluation of judicial candidates. This evaluation would require committee members to assess each candidate on a number of specific questions, such as "Is the applicant open-minded, impartial and fair?" and "Will the applicant conduct his (her) office with appropriate dignity?" Each question is assigned a certain number of points, and candidates are evaluated on an overall scale of 0-300 points.[77] This rating scale, in attempting to quantify the unquantifiable, illustrates the difficulties of scientifically evaluating candidates for judicial office.

We have given careful consideration to the issue of whether to recommend or otherwise specify the criteria which should be employed by the nominating committee for the evaluation of candidates. Although we agree that such criteria must be specified, we have decided that the determination of the criteria for evaluation should be within the discretion of the nominating committee. However, the current eligibility requirements for the office of provincial judge (5 years at the Bar or equivalent experience) should be retained. Beyond these basic requirements, the committee may wish to have regard to the criteria discussed above, or may even find that the criteria referred to in the discussion of on-going judicial evaluation programs later in this Report is of use with respect to candidates for judicial office (see Chapter 6). As we have already recommended that nominating committees be appointed on an *ad hoc* rather than permanent basis, there will likely be a succession of nominating committees constituted on each occasion that it is necessary to appoint judges to the Provincial Court. The criteria used in the appraisal of candidates by one nominating committee may not be to the satisfaction of later committees. However, the right to depart from criteria determined by earlier committees should not in any way be restricted or diminished. That is, each committee should have the discretion to accept

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[74]G.L. Gall, "The Qualities of a Judge", CALT Special Committee on the Appointment of Judges, *Judicial Selection in Canada* (1987) 119 at 143.

[75]*Supra* n. 59, at 230-231.

[76]*Supra* n. 59, at 231.

[77]*Supra* n. 59, at 232-235.

criteria selected by its predecessors (with or without modification), or to discard the previous criteria and develop new standards. Over time, we believe that a consensus as to appropriate criteria will develop, strengthening the selection process.

We recommend:

RECOMMENDATION 9

That the nominating committees should state in their advertisements the general criteria for selection which they will use.

RECOMMENDATION 10

That, apart from the continued requirements that candidates for the Provincial Court be members of the Law Society of Manitoba entitled to practise law and have so practised for at least five years, the determination of the criteria to be employed should be in the discretion of each nominating committee.

(c) Composition of list and selection of candidates

The list of candidates provided to the Attorney General by the nominating committee should contain sufficient names to allow the Attorney General some discretion in the selection of a candidate for appointment to judicial office. However, it should not provide so many names as to dilute the quality of the prospective appointees and diminish the effectiveness of the merit selection procedure. Although there must be several names provided, the nominating committee must take pains to ensure that each of the candidates listed is highly skilled and possesses the degree of competence which the committee believes is necessary for the due execution of judicial duties. There must be some choice provided to the Attorney General, but the choice should not be so great as to make the nominating process worthless. We therefore recommend:

RECOMMENDATION 11

That each nominating committee provide to the Attorney General a list of not fewer than three and not more than six names of individuals whom it recommends for the particular vacancy.

We have noted earlier that, in some jurisdictions, the candidates for the list to be provided to the Attorney General are rated in some fashion. For example, the designations "highly qualified", "qualified", "acceptable" or "otherwise" are used. We have concluded that it is not appropriate for the nominating committee to designate candidates as either "otherwise" or "acceptable". All of the candidates whose names appear on the list to be provided to the Attorney General should be possessed of such competence and skill as to be suitable for judicial office. They must all receive positive and encouraging evaluations. We also do not think that it is appropriate for the nominating committee to "rate" the candidates (i.e. first, second, third and so forth). Clearly, such a rating system could give rise to problems where the Attorney General decides to appoint a candidate who is not rated first on the list. Questions would be raised as to the propriety of such an appointment, and whether or not it was motivated by political considerations.

We feel, however, that it is appropriate for the nominating committee to indicate, where appropriate, that certain candidates are not only qualified, but are exceptional. If one of the names on the list submitted by the committee is clearly head and shoulders above the others, the nominating committee should be able to indicate that fact to the Attorney General. We recommend:

RECOMMENDATION 12

That the nominating committees not rank the names on the list of recommended candidates submitted to the Attorney General, but that they have the discretion to designate any one or more of the names on their lists as "highly recommended".

Following the submission of the list of candidates, the Attorney General should then be bound to choose the judge from that list. As noted earlier, it is this "binding" nature of the nominating committee procedure which has led us to recommend it as the process to be adopted for judicial appointments in Manitoba.

The use of a list, however, raises several important questions. First, if the Attorney General does not wish to appoint any of the nominees whose names are submitted, should he or she be able to ask the nominating committee for a new list? Secondly, what happens in the event that an individual who is chosen from the list by the Attorney General (and would thus be appointed by the Lieutenant Governor in Council) decides to decline the appointment or, for some reason, is unable to accept it?

It appears to us that a possible risk of abuse might arise if the Attorney General were allowed to ask for a new list; for example, an Attorney General could ask for list after list of candidates until one was discovered who was politically suitable. Therefore, we have decided that the Attorney General should be restricted to one list only. He or she should be obliged to appoint from the list of three to six names provided by the nominating committee and should not be able to ask for more names.

However, in the event that the nominees on this list are reduced by one or more of the nominees either refusing or becoming unable to accept an appointment, we believe that the nominating committee should be required to make a further recommendation. That is, if one of the candidates originally recommended is later withdrawn from the list (or refuses the offer of judicial office), one additional name should then be recommended to the Attorney General by the nominating committee. If two candidates are forced to withdraw or decide not to accept nominations, then two additional names should be recommended by the nominating committee (and so forth). We therefore recommend:

RECOMMENDATION 13

That the Lieutenant Governor in Council, on the recommendation of the Attorney General, be obliged to fill the particular vacancy for which the nominating committee was formed with an individual named on the list submitted by the nominating committee. The Attorney General should not be permitted to ask for a new list.

RECOMMENDATION 14

That, in the event that the Attorney General chooses an individual from the list submitted by the nominating committee and that individual then declines or is unable to accept the appointment, the nominating committee be required to add a further name to its list.

(d) Confidentiality

There are two other related questions which we must consider with respect to the nominating committee procedure. Both these questions are related to the issue of confidentiality.

While it is important that there be public participation in the judicial nominating process (both as members of the nominating committee and as sources of nominations for the positions available), it is also important that this public access not be extended to the screening and selection process itself. Although the nominating committee should advertise widely that positions are available and should make every effort to publicize the criteria which are to be employed in the selection process, the actual business of evaluating the candidates and subsequently deciding which candidates are to be recommended should be conducted in private.

There are two main reasons for our decision. First, it would be very difficult to attract potential candidates if they were not guaranteed that their names and applications would be kept strictly confidential; knowledge that a lawyer has applied to become a judge could, for example, cause serious problems with his or her partners or clients. Secondly, on-going publicity as to the names being considered by the nominating committee for recommendation to the Attorney General could result in speculation, criticism and undue pressure being applied to the committee members while the nomination process is still taking place.

A related issue is the question of whether or not to provide reasons to applicants for judicial office who are not recommended to the Attorney General. We have noted earlier that Québec, which has employed a nominating committee for over a decade, does not provide reasons for its decisions to any of the applicants for judicial office. However, the federal review committees are required to make the personal assessments of concerned individuals available to them upon request. Where the committees conclude that an individual is "not qualified" for an appointment, they will be required to indicate reasons. An individual considered to be "not qualified" will have an opportunity to be informed of these reasons, if he or she wishes, and to submit any comments to the Minister. These disclosures are intended to provide a candidate with the opportunity to correct any mistakes of fact and, generally, to clarify any information that may have affected the assessment. However, it should be remembered that the nominating committees which we are proposing will be asked to supply a list of the names of the three to six *most* qualified candidates. Omission from the list does not carry the connotation that the individual was unqualified. It simply means that others were more qualified. Such fine distinctions will generally be difficult to articulate. In that context, we see the provision of reasons to be pointless. We recommend:

RECOMMENDATION 15

That all aspects of the screening and selection process be kept strictly confidential.

RECOMMENDATION 16

That the nominating committee be under no obligation to advise a candidate why he or she was not nominated.

CHAPTER 4

REMUNERATION

A. INTRODUCTION: JUDICIAL INDEPENDENCE

In Manitoba, the salaries of provincial judges are fixed by Order-in-Council made by the Lieutenant Governor in Council;[1] that is, their salaries are set in the discretion of the provincial Cabinet. Order-in-Council 760/88, approved July 6, 1988, sets the salaries for full time provincial judges in Manitoba by linking them to those of senior civil servants; they are set "at a level equivalent to the fifth step of the pay range of the Senior Officer category level 7, as fixed from time to time within the Civil Service". The Senior Officer category is within the Province of Manitoba employee salary schedule as part of the senior management pay plan, and the 7th level is at the top of the classification for Deputy Ministers. Effective September 24, 1988, the amount payable for that level was $81,874.00 per annum. The Order-in-Council also establishes the salary differential to be paid to the two Associate Chief Judges and the Chief Judge at an additional $2,000 and $7,000 respectively ($83,874 and $88,874).[2]

In *Valente* v. *The Queen*,[3] the Supreme Court of Canada established that this method of setting the salaries of provincial judges is consistent with the minimum standards required by the *Charter of Rights and Freedoms*. In that case, financial security was established as an essential condition of judicial independence under subsection 11(d) of the *Charter*. Speaking for a unanimous Supreme Court, Mr. Justice LeDain stated:

> [Financial security] . . . means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.[4]

In *Valente*, the salaries in question were, as in Manitoba, fixed by the Lieutenant Governor in Council by regulation (unlike Manitoba, this took place following the receipt of recommendations from the Ontario Provincial Courts Committee). Essentially, the twin objections made in *Valente* to this process were that the judges' salaries were not fixed by the Legislature and were not a charge on the Consolidated Revenue Fund. While Mr. Justice LeDain agreed that "these two requirements have traditionally been regarded as affording the highest degree of security in respect of judicial salaries", he nevertheless felt that, while theoretically

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[1]MAN, s. 3(1).

[2]Manitoba has traditionally been roughly in line with the salaries of its two neighbouring provinces, Ontario and Saskatchewan, somewhat lower than British Columbia and, of late, significantly lower than Alberta. Nationally, Manitoba has usually been fourth or fifth or in the middle range. The CAPCJ 1988 survey ranks Manitoba 7th/8th (tied with Prince Edward Island): Canadian Association of Provincial Court Judges, *1988 Judicial Survey* (Rev. 1, Oct. 6, 1988).

[3]*Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 (S.C.C.).

[4]*Id.* at 184.

desirable, these two requirements were not essential to section 11(d) independence. He concluded:

> Although it may be theoretically preferable that judicial salaries should be fixed by the Legislature rather than the executive government and should be made a charge on the consolidated revenue fund rather than requiring annual appropriation, I do not think that either of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the Charter. At the present time in Canada the amount of judges' salaries is a matter for the initiative of the executive, whether they are fixed by Act of the Legislature or by regulation. Moreover, it is far from clear that having to bring proposed increases to judges' salaries before the Legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the executive alone, pursuant to a general legislative authority. In the case of the salaries of provincial court judges in Ontario, assurance that proper consideration will be given to the adequacy of judicial salaries is provided by the role assigned to the Ontario Provincial Courts Committee, although I do not consider the existence of such a committee to be essential to security of salary for purposes of s. 11(*d*). The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the executive could interfere with that right in a manner to affect the independence of the individual judge. Making judicial salaries a charge on the consolidated revenue fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the Legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole.[5]

According to *Valente* then, the minimum condition for judicial financial independence is that judges' salaries be fixed by law, and not be subject to interference by the Executive so as to affect the independence of an individual judge. The other elements, such as the role of the Legislature (and the existence of an independent Commission), while regarded as desirable, are not essential. The setting of judges' salaries by the provincial Cabinet is constitutionally valid. However, throughout the *Valente* decision are indications that, in the opinion of the Supreme Court, various aspects of the existing arrangements for Provincial Court judges are by no means ideal. That is, although higher standards of judicial independence may not, strictly speaking, be required, they may well be preferable to the status quo.

We agree that a higher standard is called for in the method by which salaries are determined for Provincial Court judges. Currently, judicial remuneration is within the Cabinet's sole discretion, raising the possibility of the intrusion of politics, apparent conflicts of interest and labour-management strife. We certainly recognize that, in a democratic society, the government must be responsible for the way in which taxpayers' money is spent. However, it appears to us unseemly that the same person who is responsible for the determination of judges' salaries is also responsible for a department whose Crown Attorneys appear before those same judges on a daily basis. There is no evidence to suggest that, as a result of this situation, there exists any control or influence either by the Attorney General's Department or by the Executive over the judiciary in the performance of their judicial duties. However, it is the perception of this dependent relationship which is at odds with the acceptable separation or independence of the judiciary from the other branches of government. Under the present compensation structure, the capacity of the judiciary to protect its independence (by ensuring its financial security) would seem to depend upon the ability of judges to lobby on their own behalf; that is, on their ability to seek increases to their pay and to oppose measures which might directly or indirectly reduce it. At best, this means that judges must go cap in hand to the provincial government and plead the case for a salary increase. At worst, a labour-management atmosphere of collective bargaining is created. This can only result in a serious lessening of the morale and self-worth of the judges in question. More importantly, it forces them into the political arena and tarnishes the public perception that the courts can be relied upon to interpret and apply our laws without concern for the effect of their decisions on their personal careers or well-being (in this case, earnings).

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[5]*Supra* n. 3, at 185-186.

The Commission is therefore of the opinion that the current method of establishing judicial salaries is unsatisfactory. It inevitably leads to a demeaning struggle over dollars between the judiciary and the government which can only be perceived negatively by the public. We therefore recommend:

RECOMMENDATION 17

That the present method by which the remuneration of provincial judges is established be replaced.

What is needed is a method of determining judicial salaries which achieves greater independence of the judiciary from the whim of government while still recognizing the overriding responsibility of government to the electorate for the spending of public monies. We will now examine alternative methods of achieving this goal.

B. ALTERNATIVE MODELS OF REMUNERATION

We have identified four methods for establishing judicial remuneration. These models may be described as follows:

(a) non-binding advisory committee;
(b) binding committee;
(c) self-operating formula;
(d) binding committee subject to negative resolution.

In this section, we will examine how these models operate and discuss their advantages and disadvantages with reference to the experiences of the jurisdictions which use such approaches.

1. Non-binding Advisory Committee

Three provinces, British Columbia, Ontario and Québec, make use of non-binding advisory committees in establishing the remuneration of their provincial judges. In addition, the same system is used by the federal government for federally-appointed judges[6] and has been proposed for use in Newfoundland. The principal advantage of such commissions is that they can provide an objective evaluation of judges' salaries. Presumably their recommendations will be more persuasive than those made by the judges themselves. They have the added advantage in that, once established, they can provide a mechanism for regular review of judicial salaries.

(a) British Columbia

In 1986, British Columbia amended its statute to provide for the resolution of judicial salaries by the Legislative Assembly and their payment out of the Consolidated Revenue Fund. It also enacted a second measure, establishing an independent commission with a mandate to advise the Legislature on the appropriate salaries for provincial judges.[7] By establishing this

[6]The Yukon Territory may also be seen as a jurisdiction making use of a non-binding advisory committee. Although the remuneration of judges in the Yukon Territory is fixed by the Commissioner in Executive Council, there is a requirement that the salaries and benefits prescribed for judges shall be reviewed annually by the Executive Council Member (responsible for the judiciary) in consultation with the Chief Judge of the Territorial Court: YT, ss. 14 and 64.

[7]BC, ss. 7 and 7.1, as am. by *Miscellaneous Statutes Amendment Act (No. 2)*, S.B.C. 1986, c. 16, ss. 48 and 49. Ordered into force by B.C. Reg. 170/86, effective July 18, 1986.

body, British Columbia in effect institutionalized the existing practice of seeking the advice of an independent body in alternate years with respect to the compensation of its provincially-appointed judges.

The Compensation Advisory Committee has three members, all appointed by the Attorney General. None of these persons are to be lawyers, judges of the Provincial Court or civil servants. One member is to be designated as chairman by the Attorney General.[8]

The Committee is required to report, by December 31 in the year in which it is appointed, on all matters respecting remuneration, allowances and benefits of Provincial Court judges. Recommendations are to be made in respect of these matters, and the Attorney General must present the Committee's report to the Legislative Assembly as soon as is practicable.[9]

(b) Ontario

The Ontario Committee, unlike the British Columbia Committee, is structured on labour relations lines. According to section 88 of the *Courts of Justice Act*, it is to be comprised of three members, of whom one is nominated for appointment jointly by the Provincial Judges Association of that Court's three divisions, one is appointed by the Lieutenant Governor in Council, and one, to be the Chairman, is designated jointly by the other two.[10] Unfortunately, the experience with this system has not been a happy one.

The Committee is required to make an annual report of its activities and recommendations. On January 30, 1981, the Committee, recognizing that "an ever widening gap" had developed between the salaries of the Provincial Court judges and those of the County Court judges despite "an opposite trend to expand the jurisdiction and responsibilities of the Provincial Court judges", recommended an immediate salary increase for 1981 and further increases for subsequent years to achieve equality with the salaries of the County Court judges by April 1, 1985.[11] While it is clear that the 1981 recommendations were never implemented (according to the subsequent reports of the Ontario Provincial Courts Committee), until 1985 the government of Ontario did not state its position on the recommendations. The lack of response by the government to the recommendations of the Committee, even in the form of disagreement with them, appears to have seriously threatened the integrity of the process, prompting the Committee to state in its 1985-86 report:

> In order for the present Committee to be in a position to make recommendations on the question of salaries, we consider it essential that the government formally respond to the 1981 recommendation.[12]

On October 25, 1985, it was announced in the Legislature that the Ontario government had decided not to accept the 1981 recommendation to establish parity between the salaries of the Provincial Court judges and those of federally-appointed County or District Court judges. The announcement included an immediate salary increase but, because of "the well recognized need

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[8]BC, ss. 7.1(1), 7.1(2) and 7.1(3).

[9]BC, ss. 7.1(4) and 7.1(5).

[10]ONT, s. 88(1).

[11]Ontario Provincial Courts Committee, *Report* (January 30, 1981) 3.

[12]Ontario Provincial Courts Committee, *Report* (1985-86) 5.

for restraint in the expenditures of the province's financial resources",[13] it was substantially less than the amount recommended by the Committee.

When the Committee received the government's answer to its salary recommendations, the provincial judges' nominee, Toronto lawyer Edward Greenspan, resigned. In December 1985, as a result of these events, the associations of the three divisions of the Provincial Court passed a resolution which had the effect of withdrawing from the Committee.[14] The Committee temporarily ceased to function. In its 1985-86 Report, the Committee recommended an immediate salary increase (apparently to provide short-term relief only, pending a formal "negotiated" response by the government to the earlier Ontario Provincial Courts Committee recommendation from 1981). It also indicated that, as of March 31, 1986, no appointment had yet been made to fill the vacancy created by Mr. Greenspan's resignation.[15] The 1986-87 report reveals no activity of the Committee whatsoever from April 1, 1986 to March 31, 1987.[16] As might be expected, after 1985, relations between the judges and government became especially strained. In April 1987, the judges passed a resolution requesting the personal intervention of the Premier.[17] On July 21, 1987, an agreement was reached to reconstitute the Ontario Provincial Courts Committee.[18]

Despite its renewal, the significant misadventure of the Ontario Provincial Courts Committee does not serve as a good advertisement for the establishment of non-binding compensation advisory committees. The Ontario experience provides a useful example of the major flaw of such committees: the ability of the government to ignore the recommendations of the committee.

(c) Québec

Recent amendments to Québec's legislation have resulted in the creation of an advisory committee which is to make recommendations respecting the remuneration, pensions and other benefits applicable to the judges of the Court of Québec.[19]

The committee is set up on a triennial basis, beginning on July 1, 1988. It is appointed by the Government, and is directed to submit a report of its recommendations to the Government within six months of its formation. The Government must, within 30 days of receipt of the

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[13]Statement to the Legislature by the Hon. Elinor Caplan, Chairman, Management Board of Cabinet and Minister of Government Services, October 25, 1985, at 3.

[14]The Provincial Court Judges Association and the Family Court Judges of Ontario passed this resolution early in December 1985. At that time, it was expected that the small Civil Division would shortly follow suit and pass a similar resolution: R. Haliechuk, "Provincial judges upset over salary 'betrayal'", *Ont. Lawyers Weekly*, December 13, 1985, 1.

[15]*Supra* n. 12, at 1.

[16]Ontario Provincial Courts Committee, *Report* (1986-87) 1.

[17]Ontario Provincial Courts Committee, *Report* (1988) 24.

[18]The Committee appears to have resumed operation in February 1988. The newly constituted Committee issued its report on September 27, 1988. The terms of operation of the Committee were specifically prescribed by the terms of a letter of agreement dated July 21, 1987 between the Attorney General of Ontario, the Hon. Ian Scott (on behalf of the Ontario government) and Paul French, who had acted throughout as counsel to the Judges' Association. Pursuant to that agreement, Committee members were to be paid honoraria and the Committee itself was to have its own operating budget and hire its own staff. The agreement also entitled representatives of the Judges' Association and the government to make written submissions to the Committee, to reply in writing to each other's submissions and to make oral presentations. The Committee was empowered to conduct what hearings and to receive what other submissions it considered necessary. The Ontario government undertook to ensure by future legislation that the recommendations of the Committee will be required to be tabled in the Legislature and referred to the Standing Committee on Administration of Justice: *supra* n. 17, at 14.

[19]PQ, s. 124, as am. by S.Q. 1988, c. 21, s. 30.

report (or within 30 days of the opening of the next session), table the report in the National Assembly. However, the legislation does not require the Government to follow the report.[20]

(d) Federally-appointed judges

Section 100 of the *Constitution Act, 1867* provides that Parliament, not the executive, is to fix and provide the salaries of federally-appointed judges.[21] In order to assist Parliament in this task, section 26 of the *Judges Act* provides for the appointment by the Minister of Justice, every third year, of not less than three and not more than five commissioners "to inquire into the adequacy of the salaries and other amounts payable under the *Judges Act* and into the adequacy of judges' benefits generally". The section further provides that within six months of their appointment, the commissioners must submit a report to the Minister of Justice "containing such recommendations as they consider appropriate". The Minister must then cause the report to be laid before Parliament "not later than the tenth sitting day of Parliament after he receives it".[22] The fact that this Commission's report is laid before Parliament, that salaries are fixed by Parliament and that they are a charge on the Consolidated Revenue Fund has not, as we shall see, resulted in automatic acceptance of the Commission's recommendations.

The first of these triennial commissions on judges' salaries and benefits, chaired by the Hon. Otto Lang, was appointed on April 6th, 1983, and its report,[23] presented to the Minister in October 1983, was laid before Parliament within the prescribed period. Although Bill C-78 gave effect to a few of the many recommendations contained in the Lang Commission Report,[24] the legislated increases were considerably less than those recommended by the Commission and brought criticism from the Canadian Bar Association. Its 1985 Resolutions 10 and 11 provided as follows:

> BE IT RESOLVED THAT the Canadian Bar Association bitterly deplores that Parliament has not yet taken appropriate action on the Lang report in full;
>
> AND BE IT FURTHER RESOLVED THAT the Canadian Bar Association urge the Minister of Justice of Canada to table the amendments necessary to enforce the Lang Report recommendations and have them adopted by Parliament without further delay.[25]

In a similar vein are the following comments contained in the Recommendations of the 1986 Commission on Judges Salaries and Benefits, chaired by H. Donald Guthrie, Q.C.:

> It is our understanding that the underlying purposes of the legislation providing for the review, by Triennial Commissions, of the adequacy of judges' salaries and other amounts payable under the *Judges Act* and of the adequacy of judges' benefits generally, are to reduce the element of partisan politics in the adjustment of judicial compensation and to reinforce the principle of judicial independence by obtaining the recommendations of "persons with experience and expertise after a full and independent review".

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[20]PQ, ss. 124 and 125.

[21]*Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3, s. 100.

[22]*Judges Act*, R.S.C. 1985, c. J-1, s. 26.

[23]Canada, Department of Justice, Commission on Judges' Salaries and Benefits, *Report and Recommendations* (1983) (hereinafter referred to as the Lang Commission).

[24]*An Act to Amend the Governor General's Act, the Governor General's Retiring Annuity Act, the Salaries Act and the Judges Act*, S.C. 1985, c. 48.

[25]Resolution No. 10 of the Canadian Bar Association (1985) reported in *National*, September, 1985, 42. While accepting the Lang Commission proposals to establish a new base salary for the different categories of judges, the Government of Canada subsequently rejected the levels proposed by Lang. It chose to set levels about 15% lower than the Lang Commission proposals.

> Delay in implementing or substantial disregard of the recommendations of a Triennial Commission threatens the integrity of the review process and materially reduces its effectiveness. . . .
>
> We therefore recommend that Parliament either agree promptly with and implement quickly the individual recommendations of this and subsequent Triennial Commissions or, if necessary, indicate promptly its disagreement with any of such recommendations.[26]

The Government of Canada subsequently gave effect to many of the recommendations of the Guthrie Commission but, despite the unanimity of the Commission's proposals for salary increments, the increases were considerably less than those recommended by the 1986 Commission.[27]

(e) Newfoundland: The Orsborn Commission

By Order-in-Council issued October 1985, Mr. David Orsborn was appointed as a single commissioner to inquire into and report upon the salaries, pensions and other benefits of Provincial Court judges in Newfoundland. Mr. Orsborn filed his report December 31, 1985. It appears that he conducted his investigation without knowledge of the Ontario judges' wage dispute. Thus, he was prompted to state that while he could see no demonstrable benefit in having judges' salaries fixed by statute rather than by subordinate legislation,[28] he was nevertheless disposed to recommend the establishment of an advisory commission along the lines of the Ontario Provincial Courts Committee. In the context of his report, he made more specific mention of that Committee and stated as follows:

> It is however possible to provide for the legitimate interests of the Province within a system of setting and paying judicial salaries which may reasonably be perceived to be independent and free from arbitrary Executive action. The approach recently adopted by the federal Government and that used in Ontario avoid the periodic negotiation of judicial salaries, and following receipt of the report and recommendations of an independent body, establish a salary payable by law for the period in question.
>
> In my opinion a similar approach should be adopted in Newfoundland . . . . In my view there is benefit to be gained from the Legislature having access to any report or advice given to the Executive. Such access allows the matter of judges' salaries and benefits to be subjected to a fully informed public scrutiny and debate, which scrutiny and debate may be particularly appropriate if the eventual Executive action departs significantly from the advice received.[29]

Accordingly, the Orsborn Commission recommended that a statutory commission on judges' salaries and benefits should be established with a commission being appointed every three years to inquire and report. As with the Ontario Provincial Courts Committee, Orsborn

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[26]Canada, Department of Justice, Commission on Judges' Salaries and Benefits, *Report and Recommendations* (1987) 6.

[27]Judicial salary levels as of April 1, 1989, are as follows: Chief Justices and Associate Chief Justices of Superior Courts, the Federal Court of Canada and the Tax Court of Canada - $146,400; Judges of the Superior Courts, the Federal Court of Canada and the Tax Court of Canada - $133,800; Chief Justices and Associate Chief Justices of District and County Courts - $141,400; Judges of District and County Courts - $128,800: Telephone conversation with Mrs. Fox, Office of the Commissioner for Federal Judicial Affairs, June 5, 1989.

[28]Newfoundland, Commission of Inquiry Into Salaries and Benefits of Provincial Court Judges (Dec. 31, 1985) 45 (hereinafter referred to as the "Orsborn Report"). According to the Orsborn Report, the latter approach is faster, more flexible and more suitable to those matters which are subject to recurring review. The Ontario Provincial Courts Committee disagreed. According to its 1988 Report, the important advantage of removing the salary determination process from the exclusive discretion of the provincial executive far outweighs the disadvantage that the process of adjusting those salaries become somewhat more time-consuming: *supra* n. 17, at 52.

[29]Orsborn Report, *supra* n. 28, at 44-45.

recommended that the Newfoundland tribunal have three members, including one appointed on the recommendation of the Provincial Judges Association and a chairman appointed with the agreement of the Association. His recommendation further provides that the Government should be required to table the report of this commission in the House of Assembly within 15 sitting days of the receipt of its report.[30] Nonetheless, the Newfoundland government chose not to adopt the recommendations of the Orsborn Commission and did not establish an advisory commission as recommended.

2. Binding Committee

(a) Model Act

As an alternative to the on-going struggle between government and advisory committees, the Canadian Association of Provincial Court Judges (CAPCJ) proposed in its Model Provincial Court Act[31] the creation of a committee composed of three members, one to be appointed by the judges, one to be appointed by the government and the third to be appointed jointly by the judges and the government. The recommendations of the committee would be binding upon all parties including the judges of the Provincial Court and the provincial Legislature. [32]

(b) Nova Scotia

The only Canadian jurisdiction to create such a committee is Nova Scotia. On May 25, 1988, assent was given to a bill providing for the appointment on or before the first day of November each year, of a tribunal to determine the salaries of provincial judges.[33] Upon receipt of the recommendations of this body, the provincial Cabinet is to cause the recommendations to be implemented and the recommendations shall have the same force and effect as if enacted by the Legislature. However, the Nova Scotia legislation departs from the Model Act proposed by the CAPCJ in one important respect. The Nova Scotia tribunal is to be composed of one person named by the provincial government from nominees selected by the judges of the Provincial Court and two other persons named by the provincial government; the chairman is to be selected by the provincial government after appropriate consultation with the relevant chief judges. In short, although the tribunal's recommendations are binding upon the provincial government, the government controls the appointment of a majority of its members.

In Manitoba, the provincial Bench has urged the adoption of the Nova Scotia amendment, citing its belief that the provision would give appropriate legislative recognition to their independent status and would ensure that judges would no longer be directly involved in "labour negotiations" thereby undermining their actual and apparent independence. Both the Canadian Bar Association and the Manitoba Bench share the view that an essential factor in the recognition of the Bench as truly independent is the need for a separate body or agency available to deal with the government on the subject of remuneration and benefits[34] for provincial judges.

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[30]Orsborn Report, *supra* n. 28, at 45-46.

[31]Committee on Judicial Independence, Canadian Association of Provincial Court Judges, "Model Act (Provincial Court)" (1987, No. 4), 11 Prov. Judges J. 21.

[32]*Supra* n. 31, s. 25.

[33]*Act to Amend Chapter 13 of the Act of 1976, the Judges of the Provincial Court Act*, S.N.S. 1982, c. 47.

[34]The Nova Scotia amendment does not appear to have included benefits other than salaries and per diem payments as matters within the competence of the tribunal. Apparently, these matters will continue to be provided for in ss. 17-18 of the Nova Scotia Act. These provide that the judge is an employee within the meaning of the Public Service Superannuation Act and further provide additional pension benefits to judges specifically: NS, ss. 17 and 18.

(c) Is "binding" binding?

Both the Model Act and the Nova Scotia legislation provide that the recommendations of their respective committees are binding upon the provincial Legislature. One might reasonably assume that this means that the provincial Legislature is powerless to alter a recommendation with which it disagreed.

We submit that this is not the case. As a matter of constitutional law and parliamentary practice, a provincial Legislature cannot bind itself or a future Legislature in that fashion. There is nothing preventing a government from introducing legislation overriding the so-called binding recommendations of such a tribunal; there is nothing preventing a Legislature from passing such a bill. In short, it is misleading to describe the recommendations of the bodies contemplated by the Model Act and the Nova Scotia legislation as binding. They are binding only so long as the Legislature does not pass legislation overriding them. Arguably, this model may, in substance, be identical to the binding committee with negative resolution model referred to later in this Chapter.

3. Self-operating Formula

Despite its strong endorsement of the Nova Scotia amendment, close attention should also be given to a related policy statement adopted by the CAPCJ Executive. At its 1988 spring executive meeting, it was decided that the CAPCJ Executive and provincial representatives adopt a compensation policy for all Provincial Court judges of not less than parity in remuneration nd benefits with the federal county/district court levels. That the Association has seen fit to recommend a specific level of salary (at least to the extent that it adopts a self-operating formula for the determination of that salary) would seem to obviate the need for the compensation commission proposed in its Model Act. Prince Edward Island and, to some extent, Alberta and Newfoundland have adopted a similar approach, so that the salaries paid to Provincial Court judges in those jurisdictions are tied, in varying degrees, to some independent factor or mechanism for adjustment.

(a) Prince Edward Island

In Prince Edward Island, as of May 17, 1988,[35] Provincial Court judges will be paid an amount that is equal to the national average determined by calculating the average remuneration of provincial judges in the other provinces of Canada as of April 1 in each year.[36]

(b) Newfoundland

Newfoundland, in lieu of the recommendation of the Orsborn Commission referred to earlier to establish an independent commission along the lines of the Ontario Provincial Courts

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[35]PEI, ss. 3(3) and 3(3.1), as am. by *An Act to Amend The Provincial Court Act*, S.P.E.I. 1988, c. 54, s. 1.

[36]The amending Act further provides that additional remuneration in an amount fixed by the Lieutenant Governor in Council may be paid to the Chief Judge: PEI, s. 3(3.1) as am. by *An Act to Amend The Provincial Court Act*, S.P.E.I. 1988, c. 54, s. 1. The salaries for Provincial Court judges in Prince Edward Island for the 1987-88 fiscal year were established by a one-man Commission which was put in place through an Order in Council. The provincial Cabinet agreed to be bound by the recommendations of the Commission. Subsequently, the statutory enactment referred to above was negotiated.

Committee, continues to provide for payment of a salary to its Provincial Court judges which is fixed by the Lieutenant Governor in Council. The salary is paid out of the Consolidated Revenue Fund of the province and is fixed by regulation made under section 26 of that province's *Provincial Court Act*.[37] Newfoundland Regulation 161/87, filed September 1, 1987, provides the following formula:

> (1) the annual salary of a provincial court judge shall be
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> (a) effective from the first day of April 1986, 77% of the salary of the Deputy Minister of Justice of the Province;
>
> (b) effective from the first day of April 1987, 81% of the salary of the Deputy Minister of Justice of the Province;
>
> (c) effective from the first day of April 1988, 85% of the salary of the Deputy Minister of Justice of the Province as it is from time to time.

(c) Alberta

Alberta follows a similar approach by paying its Provincial Court judges 80% of the salary received by Superior Court judges under the federal *Judges Act*. However, this is a matter of government policy, rather than legislation and therefore is subject to change at any time.

4. Binding Committee Subject to Negative Resolution

The use of a binding committee subject to negative resolution was outlined by the Lang Commission in its report in 1983. Recognizing the need to take positive action and bring the issue of the judges' salaries outside the sphere of politics, the Lang Commission cited as exemplary the practice now followed in the Australian State of New South Wales. In substance, this procedure provides for an independent Wage Court or Remuneration Tribunal. The Tribunal's annual determinations with respect to the remuneration to be paid to judges (and others specified in the governing legislation), once presented to Parliament, take effect unless there is a specific objection by half of the Legislature within a fixed period of time. Since the adoption of this proposal at the federal level raises questions of constitutionality, the Lang Commission declined to give it immediate consideration, but suggested that the proposal might warrant further investigation as a future means of fixing judicial compensation.[38]

Following the Lang Commission Report, the Canadian Bar Association resolved in 1985 to urge the government:

> (a) to take all necessary steps to further amend the Judges Act, in order to fully and finally bring the issue of the judges' salaries and benefits outside the sphere of politics;
>
> (b) for this purpose, to include in the Judges Act provisions, under which at least 50% of the Members of Parliament are needed to reject the recommendations of an independent Commission on Judges' salaries.[39]

Both the Joint Committee on Judicial Benefits and the Canadian Bar Association subsequently made submissions to the 1986 Commission on Judges Salaries and Benefits (the

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[37]NFLD, s. 26(1)(a).

[38]*Supra* n. 23, at 13-14.

[39]Resolution No. 11 of the Canadian Bar Association (1985) reported in *National*, September, 1985, 42.

Guthrie Commission) recommending to the Commission that action be taken with a view to the adoption of the New South Wales formula.[40] The fact that the Guthrie Commission declined to recommend the adoption of the procedure by way of negative resolution was in large measure due to the fact that, in their view, to apply the formula in Canada to the federal judiciary would quite likely require an amendment to section 100 of the *Constitution Act, 1867*. The Commission, without the benefit of any evidence on the experience, favourable or otherwise, was not convinced that it would be such an improvement on the present system as to justify a constitutional amendment. However, the same objection does not apply to provincial judges, as there is no explicit provision in the *Constitution* governing the remuneration of these officers.

Five separate state commissions in the United States presently employ the negative resolution format. Although the compensation commissions in most states merely collect data and make recommendations to the Legislature, those of Alabama, Arizona, Maryland, Michigan and Rhode Island are authorized to set salary levels, subject to reversal by the Legislature.[41]

Finally, we note that the Canadian Judicial Council has also expressed its agreement with the view that "the New South Wales formula is so sensible and efficient that every effort should be made to adopt it in Canada.[42]

C. ANALYSIS AND RECOMMENDATIONS

It is not the purpose of this review to establish the quantum of remuneration for Manitoba's Provincial Court judges. We are concerned with the mechanism whereby the salary is determined. In this section, we consider which, if any, of the models for judicial remuneration should be adopted for Manitoba's Provincial Court.

The use of non-binding advisory committees has received much support in the past, including endorsements from the American Bar Association, the Canadian Bar Association, the Canadian Association of Provincial Court Judges and the Orsborn Commission in Newfoundland. However, these endorsements must be viewed in the light of the subsequent events in Ontario. The experience in that province highlights the fatal flaw of this model. The committee proposes, but it is still the Cabinet which disposes - and, as history has shown us, rarely in the manner recommended. As Ontario's Attorney General, Ian Scott, has pointed out:

> The terms of reference of the committee were to recommend to Cabinet, not to dispose [of the matter on its own]. The Committee recommended to Cabinet, and the Cabinet - conscious of all its public responsibilities did not accept that recommendation.[43]

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[40]*Supra* n. 26, at 25.

[41]Ala. Code §12-10-5 (1977): unless rejected by joint resolution or altered by act of legislature at session to which reports submitted, recommendations of commission shall become law upon adjournment of that session of legislature; Ariz. Rev. Stat. Ann. §51-1904(a)(b) (1974): after review of commission report, Governor to submit pay recommendations that become effective on first Monday in January unless law enacted establishing rate of pay other than that of recommendation or either House of Legislature specifically disapproves of such recommendations; Md. Cts. & Jud. Proc. Code Ann. §1-708(d) (Supp. 1981): salary recommendations made by commission to be introduced as joint resolutions in each house of General Assembly and shall apply if General Assembly fails to adopt or amend joint resolution within 50 days after introduction; Mich. Comp. Laws §15.217 (1981): determination of the commission with respect to salaries and expense allowances . . . shall be effective January 1 of the year following filing unless rejected by concurrent resolutions adopted by 2/3 vote of members; R.I. Gen. Laws §36-4-16.1 (Supp. 1980): board's determination of salaries of judges becomes effective 30 days after referred or last day of February unless rejected by formal action of House and Senate acting concurrently within that time. Prior to its abolition, the Pennsylvania Commonwealth Compensation Commission also had the power to make binding recommendations: 1971 Pa. Laws No. 8 repealed by 1973 Pa. Laws No. 57, s. 1.

[42]Canadian Judicial Council, *Report* (1988) 19.

[43]D. Brillinger, "Provincial Chief Judge and A.G. trade tough words at ceremony", *Ont. Lawyers Weekly*, January 17, 1986, 1.

Without the power to implement as well as recommend, it seems inevitable that a non-binding advisory committee will only perpetuate, if not exacerbate, the ills of the present system. Accordingly, we cannot recommend this model.

Under the self-operating formula, salaries are calculated according to a selected formula (e.g. salaries are pegged to an average of judicial salaries from across Canada). Three Canadian provinces (Prince Edward Island, Newfoundland and Alberta) use a self-operating formula.

Though they employ different guidelines, the Prince Edward Island, Newfoundland and Alberta approaches have the common advantage of certainty and avoid the process of periodic review and submission which occurs when Provincial Court judges' salaries are determined by an independent commission. In addition, due to their simplicity, administrative costs involved in implementing these schemes appear to be minimal. Furthermore, no legislative time needs to be invested in the process. On the other hand, these schemes surrender completely any legislative accountability for compensation decisions, by putting what can perhaps be seen as too much faith in one guideline, to the exclusion of some other equally appropriate (or perhaps, in time, more appropriate) standard.

Even if a self-operating formula were adopted, selecting an appropriate guideline would be extremely difficult and arbitrary. For example, provincial judges' salaries might be linked to those of judges appointed by the federal government. However, such a standard would completely ignore the ability of a given province (in this case, Manitoba) to pay such amounts, since the salaries would be automatically linked with the salaries established by the Parliament of Canada. Parity also ignores the fact that, while the Provincial Court is certainly an essential part of an interrelated national judicial system, constitutionally each province retains control over the administration of justice in the province and over its Provincial Courts.[44] Such a constitutional separation supports the argument that the resources available for the administration of justice may be expected to differ from province to province.[45] Linking provincial judges' salaries to those of senior civil servants is similarly inappropriate. As the Ontario Provincial Courts Committee has pointed out, totally different imperatives govern the salaries appropriate to these offices, which are primarily managerial and administrative in nature. Since Deputy Ministers ensure the prompt and efficient realization of government policy, it is appropriate to provide them with wide salary ranges and payment based on performance. This is not the case with Provincial Court judges, however. In recognition of the unique status and function this group performs, the Committee stated that Provincial Court judges were not meaningfully compared with anyone whose salary is paid by the provincial government, and who did not perform a judicial or quasi-judicial function.[46] The unavoidable social constraints of the provincial judges'

[44]*Supra* n. 28, at 31.

[45]*Supra* n. 28, at 31. *See also* Ontario Provincial Courts Committee, *Report* (1988) 68, discussing the argument that provincial judges should receive the same remuneration as District Court judges:

> First, we cannot accept that if the two groups deserve the same salary, the salary they deserve is the one that the higher paid group is now receiving; that position needs independent support. This Committee, however, has been given neither the information nor the authority to satisfy itself that the judges of the District Court are at present being paid appropriately: for all we know, it may be that they are paid too much or too little. The salary District Court judges receive cannot, therefore, be binding on a salary recommendation that comes from us.
>
> Second, we cannot ignore the fact that the two groups of judges are paid by different levels of government and that those levels of government have different powers and responsibilities. Unlike the federal government, which pays the District Court judges, the government of Ontario does not have plenary powers of taxation and has no authority to regulate interest rates or the money supply. These distinctions alone would suffice to justify Ontario in having different fiscal priorities from those of the federal government and in being somewhat more cautious about expenditures generally. In addition, federal and provincial governments are accountable independently to their electorates. As a result, judicial remuneration scales that may be in order for one level of government may be thought to be inappropriate for the other. Any salary recommendations for judges paid by Ontario have, therefore, to reflect the conditions that obtain in Ontario.

[46]*Supra* n. 17, at 70. The level of remuneration paid to the heads of provincially-appointed administrative and quasi-judicial tribunals was, in the opinion of the Committee, useful in considering what Provincial Court judges should be paid.

unique position, and the sacrifices of freedom, financial rewards and business pursuits which they have to make (including the particular tax implications of their appointment) are among the various factors which alter significantly the kinds of comparisons which can be made between the salaries of judges and those of other groups.

As a result of those difficulties, the Commission has concluded that the self-operating formula should not be adopted in Manitoba. It is an approach which can ignore the particular needs and circumstances of the judiciary and the jurisdiction which employs it, as well as being a method which depends on variables which may change independently and unexpectedly. For example, certain aspects of the compensation package of a particular jurisdiction (e.g. Ontario) may be increased, while certain other aspects of another jurisdiction's plan (e.g. British Columbia) may be decreased. The resulting "national average" is simply a statistical fiction; it is not representative of all (or even most) Canadian jurisdictions, because it is dependent on numerous, unrelated variables. We cannot simply say: "this is what judicial compensation is generally like" across Canada, because the average figure generated by a self-operating formula may simply be a statistical result, not a true picture of Canadian jurisdictions generally.

The binding committee approach is recommended by the Model Act[47] and the Manitoba Provincial Court Act Amendment Committee (composed of the judges themselves). As indicated, Nova Scotia has implemented a binding committee for the determination of judicial salaries in that province. This method of establishing judicial remuneration requires the government to enact or otherwise act upon the committee's recommendations. Its flaws are that the Government may (if no restriction is placed upon appointment) dominate the selection of committee members (which may re-politicize the process), and that the placing of discretion with respect to remuneration in the hands of a non-elected committee could be regarded as a potential threat to the public purse.

On the other hand, the binding committee has a number of important advantages. It provides a meaningful forum where the views of both government and the judges can be put forward, questioned and independently evaluated. At the same time, the committee's ability to make binding decisions eliminates the frustrations found in other provinces.

On balance, we are attracted to this model. However, because of the importance which we attach to the principle of parliamentary responsibility, we think it essential that the Legislature explicitly retain the power to override the decisions of the binding committee by negative resolution. We recommend:

RECOMMENDATION 18

That The Provincial Court Act be amended to provide for the establishment of an independent committee for the purpose of determining the remuneration of Provincial Court judges.

RECOMMENDATION 19

That the decisions of the independent committee be legally binding unless the Legislature votes to the contrary within a specified period of time.

The structure of this committee is as important as its mandate. It is essential for the perception of judicial independence that the committee is not simply a rubber-stamp of the government's desires and plans. However, at the same time, the committee's recommendations must be both pragmatic and realistic. This means that government interests, and particularly

[47] *Supra* n. 31, s. 25.

financial realities (i.e. budget constraints), must be considered, but not over-emphasized, by the committee.

We feel that the competing demands of judicial autonomy (and well-being) and budgetary constraints can best be met by recommending a committee whose composition includes appointees of both the government and the provincial judiciary. The labour relations model (one appointee selected by government, one appointee selected by the judiciary, and the final member chosen by the first two appointees) may give rise to acrimony and discord between committee members (as it has in Ontario). This model should therefore not be followed. We believe that the committee should be composed of three persons. Two members should be appointed by the government (presumably these will be people who have experience in dealing with government and are acquainted with the delicate matter of fiscal planning), but they should not both be civil servants. That is, no more than one of the committee members should be a person in the full-time employment of the provincial government. This will help to ensure that civil service appointees do not dominate the committee.

A further measure to combat government monopolization of the compensation committee is to require that the provincial judges themselves appoint a member. Presumably, the judiciary will select a representative who is well-equipped to convey the concerns of provincial judges to the committee, while at the same time remaining objective enough to appreciate other factors which must be considered.

The requirement of a non-civil service appointee and a person selected by the judiciary will reduce the risk of government domination of the committee's actions and decisions, and the conferring of some appointment power on the government will ensure that a variety of perspectives are brought into the decision-making process. We therefore recommend:

RECOMMENDATION 20

That the independent committee be composed of three members:

(a) one of whom shall be named by the provincial judges; and

(b) two of whom shall be named by the provincial government (the Cabinet).

RECOMMENDATION 21

That not more than one of the government's appointees be a person employed on a full-time basis by the provincial government.

While we do not feel that such a committee would or should require the employment of a permanent staff, its proper operation will probably require the retention of expert or technical assistance from time to time. The committee should be able to retain persons who are versed in statistical analysis, government spending and budgetary considerations, and other matters relevant to the determination of quantum (presumably, some, if not all, of the committee members would also have experience or training in such areas). We recommend:

RECOMMENDATION 22

That the independent committee have the power to hire experts and consultants and the budget necessary to pay them.

An important consideration is the frequency of operation of the committee. While some jurisdictions have employed triennial compensation advisory committees, it is essential that lengthy delays (potentially demoralizing to the judiciary) be avoided. We recommend:

RECOMMENDATION 23

That the independent committee be convened every two years.

RECOMMENDATION 24

That the Attorney General also be empowered, in extraordinary circumstances, to convene a committee at any other time.

D. OTHER MATTERS

1. Pension, Vacations, Sick Leave and Other Benefits

At present, the holidays, vacation pay, sick leave, travel allowances and retirement or death benefits, including pensions, for Manitoba's provincial judiciary are determined by reference to civil service standards.[48] That is, for the purposes of these benefits, Provincial Court judges are treated as if they were civil servants in the employ of the Manitoba Government.

It is anomalous to establish an independent committee for determining some aspects of judicial remuneration, while allowing other aspects to continue to be dealt with in a fashion which does not distinguish between the judiciary and civil servants generally. Salaries are only one element of the three which comprise the judicial compensation package (the other elements are pensions and "fringe benefits", i.e. other financial benefits). The compensation package must be viewed as a whole. For example, the anticipation of improvements being made to the benefits under the pension scheme might, logically, influence salary determination.

There is no justification for treating salaries as distinct from other elements of the judicial compensation package. The process of determination of financial benefits for the judiciary should be uniform. Accordingly, the Commission recommends:

RECOMMENDATION 25

That the independent committee's jurisdiction extend to all aspects of remuneration, including pensions, vacations, sick leave and other benefits.

Pensions are of particular interest and significance because of the current judicial retirement plan available to our Provincial Court judges, and the way in which this plan compares to those of other jurisdictions. At present the pension benefits of Provincial Court judges in Manitoba are governed by *The Civil Service Superannuation Act*.[49] According to subsection 55(2) of *The Provincial Court Act*, if there are no specific provisions governing pension benefits for judges and their surviving spouses and children, *The Civil Service Superannuation Act* applies to full-time judges as though they were employees within the meaning of the Act. Accordingly, judges contribute approximately 7%[50] of their earnings to the

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[48]MAN, ss. 11(1) and 48.

[49]*The Civil Service Superannuation Act*, C.C.S.M. c. C120.

[50]Employee contributions to the fund are 5.1% of their yearly earnings up to the maximum pensionable earnings for the year under the Canada Pension Plan and 7% of their yearly earnings in excess of that amount: *The Civil Service Superannuation Act*, C.C.S.M. c. 120, s. 17.

general public service scheme established under this Act, as do all provincial civil servants. Pension benefits are paid monthly following retirement, calculated according to a formula based on years of service. The actual calculation is determined on the basis of 2% of a member's best five years average salary times the number of years and months of his or her pensionable service, less 0.6% of the average Canadian pension earnings in the same five years multiplied by the number of years and months of pensionable service from January 1, 1986 to the date of retirement.[51] Full pension benefits are not achieved until after approximately 39 years of accumulated service.[52] Cost of living adjustments are made annually, reflecting increases in the Consumer Price Index, but with an upper ceiling provided.

Normal retirement age is 71,[53] though retirement is not mandatory. However, as with other Civil Service Superannuation Fund members, judges may retire at age 65 with an unreduced pension, provided they have one year of service or more. Early retirement is available to employees at age 55 who have 10 years or more years of qualifying service. For early retirement, the pension is reduced by 3/4% for each year that the employee retires before 60. Therefore, the pension of a judge retiring at age 55 will be reduced by 3 3/4% (5 years x .75%).[54]

Special provisions govern instances where death or resignation occur during service. In these cases, the value of the pension benefit depends on a number of factors including the length of service and age of the judge. If, however, pension entitlement is interrupted by termination or death within the first five years of appointment, the only benefit available is a direct cash refund of the original contributions with interest. Ten or more years of qualifying service accord a judge full death benefits in the form of an allowance equal to 60% of the earned pension. Survivors of a judge who was already receiving or would have been eligible to receive superannuation payments receive 2/3 of the pension entitlement.[55]

As we have seen, in Manitoba, Provincial Court judges do not have a pension and survivor benefit scheme which is separate and distinct from that employed by the general public service. According to representations made by the provincial judges, the use of this plan is by itself a factor which must deter the mature experienced practitioner from accepting a provincial judicial appointment. The greater the number of years of experience and wisdom that he or she could bring with him to the Bench, the smaller will his or her pension be at retirement.[56]

To place the matter in perspective, a Provincial Court judge in this province requires approximately 39 years of service to become entitled at the age of 65 to a full pension.[57] Except for lawyers who work in government service prior to being appointed, a lawyer would have to be appointed to the provincial Bench by the age of 26, almost directly out of law school, to become

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[51]*The Civil Service Superannuation Act*, C.C.S.M. c. C120, s. 26. The pension formula was improved, effective 1985, so that pensions previously based on the six best years would henceforth be calculated on the best five years.

[52]According to *The Civil Service Superannuation Act*, C.C.S.M. c. C120, s. 38(2), the calculation involves *the lesser of*: 2% of the employee's yearly average pensionable earnings during the five highest earning years of the final 12 years, multiplied by the number of years and months of service less 0.6% of the average Canadian pension earnings in the same five years multiplied by the number of years and months of pensionable service from January 1, 1986 to the date of retirement; *or* 70% of the average yearly pensionable earnings during the five highest earning years of the final 12 years.

[53]*The Civil Service Superannuation Act*, C.C.S.M. c. C120, s. 1(1), defines "normal retirement age" as the age of 70 years and 11 months. Section 25 of the Act provides that, subject as herein otherwise provided, the Board shall grant to an employee who retires on or after reaching normal retirement age, an annual superannuation allowance computed in accordance with s. 26(1).

[54]*The Civil Service Superannuation Act*, C.C.S.M. c. C120, s. 59.

[55]*The Civil Service Superannuation Act*, C.C.S.M. c. C120, s. 42.

[56]Manitoba Provincial Judges Association Statement of Concern, October 12, 1977, 9.

[57]According to the CAPCJ 1988 survey, revised as of October 6, 1988, the maximum pension after 35 years of service would be $53,893.70: *supra* n. 2. Unfortunately, this survey inaccurately assumes that the maximum pension would be payable after just 35 years of service.

entitled to a full pension at age 65. Since five years' practice is a requirement before judicial appointment,[58] regardless of the youth of the appointee, there is almost no way that a judge will ever attain full entitlement under a plan such as that provided by the Civil Service Superannuation fund.

On the other hand, a federally-appointed judge requires only a minimum of 15 years' service to become entitled at age 65 to a full pension which, for a federally-appointed judge, means 2/3 of the salary at the time he or she leaves the Bench. The same pension benefit is available after only 10 years' qualifying service, if the judge maintains his or her office until reaching the maximum retirement age of 75.[59]

As might be expected, judicial pensions are not available in most of the provincial and territorial jurisdictions on as favourable terms as the pensions of the federal judiciary. But, according to the 1988 survey done by the CAPCJ, Manitoba ranks as unfavourably low as 8th (out of 12) in the final value of its estimated maximum pension after 35 years.[60] The picture looks even worse when the estimated average pension after 20 years' service is considered. Indeed, the current arrangements in Manitoba after 20 years' service are poorer than the arrangements not only for judges of the Court of Queen's Bench, but also those existing in every other province in Canada except Newfoundland.[61] With less than 39 years of service, given that he or she reaches the age of 65 in the year 1988 and is appointed at the age of 40, 45 or 50, we have estimated that the pension of a Manitoba Provincial Court judge would be (approximately):

Age of appointment	**Pension at retirement**
Appointed at age 40 (25 years on the Bench)	$38,495.50
Appointed at age 45 (20 years on the Bench)	$30,796.40
Appointed at age 50 (15 years on the Bench)	$23,097.30

We therefore recommend:

RECOMMENDATION 26

That the independent committee recognize as an urgent priority the revision of the pension plan applicable to provincial judges with a view to reducing significantly the number of years of service required to attain full pension.

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[58]MAN. s. 3(2).

[59]*Judges Act*, R.S.C. 1985, c. J-1, s. 42.

[60]*Supra* n. 2.

[61]According to the CAPCJ survey, which ranked pension arrangements of the 10 provinces and 2 territories, Manitoba occupies the 11th position: *supra* n. 2. Since the career of judges is relatively short - often less than 20 years - the 20-year value is a more realistic measure of the available benefits of our pension plan than is the value of a full pension which, in the case of Manitoba, may be meaningless.

2. Retirement and Supernumerary Status

By making civil service standards applicable to Provincial Court judges and not providing for any automatic entitlement to full pension upon reaching the usual retirement age, the province has created a retirement scheme for provincial judges which is less than attractive. There is, however, an alternative. Many of Canada's provincial and territorial jurisdictions provide for a post-retirement service option (usually with a reduced workload) for their judiciary, often in conjunction with compulsory retirement either at age 65 or 70. That is, the judge may be required to retire from full-time activities on the Bench, but there is available an option for extended service (with a continued salary) past the compulsory retirement age.

This extended service is commonly known as supernumerary status. Upon reaching retirement age, a judge may elect to continue to serve on the Bench. This continued service enhances the judge's financial position and, at the same time, provides the Court with a pool of experienced judges to assist in special cases of long duration and to meet situations where the workload exceeds the availability of full-time judges.

However, the availability of supernumerary status for Provincial Court judges raises special constitutional questions, returning us to a consideration of the requisite standards of independence and impartiality in *Valente* v. *The Queen*.[62] That case is very specific about the option for re-appointment of judges or extension of judicial service past the normal retirement age. Referring to the availability of supernumerary status at the discretion of the government, LeDain J., writing for the Court, had the following to say:

> . . . [T]he Legislature has expressly provided for two kinds of tenure - one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure - I am of the opinion that the second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of section 11*(d)* of the Charter. The reasonable perception is that the Legislature has deliberately, in the case of one category of judges, reserved to the executive the right to terminate the holding of office without the necessity of any particular justification and without any inhibition or restraint arising from perceived tradition.[63]

The above statement clearly rules out a provision which would purport to extend a judge's service past retirement age at the pleasure of the Executive. But what of a provision which makes an appointment past retirement age subject to the annual review of the Chief Judge (that is, judicial service is extended on the decision of the Chief Judge of the Provincial Court, not at the pleasure of the Executive)? LeDain J. stated that such a provision:

> . . . while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to . . . [a provision which provides for re-appointment at the discretion of the executive] since it replaces the discretion of the executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the court and the administration of justice generally.[64]

We have considered whether a supernumerary option should be available for Manitoba's provincial judiciary in light of these comments. However, a preliminary issue is the question of mandatory retirement. Although Manitoba does not impose mandatory retirement on its provincial judges, most Canadian jurisdictions do require judges to retire at a certain age. Furthermore, the Model Act prepared by the Canadian Association of Provincial Court Judges

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[62] *Supra* n. 3.

[63] *Supra* n. 3, at 183.

[64] *Supra* n. 3, at 184.

stipulates that judges must retire at age 65 (this is combined with an option for supernumerary status.)[65] There are no reasons arising out of the requirements for judicial independence to require a change to a system of mandatory retirement. We believe and assume that the status quo applicable to Provincial Court judges (no mandatory retirement) will continue. Provincial Court judges can and should be encouraged to seek retirement at an age when their skills and capacities are no longer sufficient to discharge adequately the duties of their office.

There are a number of advantages which are associated with supernumerary status, as noted earlier. We have therefore concluded that Provincial Court judges should be allowed to elect supernumerary status if they so desire. Furthermore, the election to take supernumerary status should not be subject to any form of approval, either by the Chief Judge of the Provincial Court or even the Judicial Council. As the Supreme Court of Canada noted in *Valente*, provisions which make service past normal retirement age subject to the annual review of the Chief Judge are by no means ideal.[66] Accordingly, we do not recommend a system which would create the appearance that the continuation in office of a judge of the Provincial Court is dependent upon the favour of some other body or person, even a person within the Court. Provincial Court judges should be entitled as of right to elect to take supernumerary status, and it should be the judges themselves who determine the period for which they are to continue in office in a supernumerary capacity.

However, in order to prevent judges from electing supernumerary status for periods beyond which most persons would be capable of carrying out the duties of a Provincial Court judge, some limit should be placed upon the number of years which a judge may serve in the supernumerary capacity. We have decided that the period of supernumerary service should be limited to a maximum of five years. This term should not be renewable, again to avoid the need to have some other person make decisions about a judge's tenure. In order to allow for the rejuvenation of the provincial judiciary and to diminish the risk of aging judges being charged with responsibilities which they are not capable of carrying out, the availability of supernumerary status should not be limited to only the oldest and most experienced judges. We suggest using a combination of age and experience levels which enhance the election of supernumerary status while at the same time placing no undue pressure upon the judiciary to leave the Bench.

We recommend:

RECOMMENDATION 27

That Provincial Court judges should be entitled as of right to elect to take supernumerary status upon:

(a) attaining the age of 60 years and having continued in judicial office for at least 20 years; or

(b) attaining the age of 65 years and having continued in judicial office for at least 15 years; or

(c) attaining the age of 70 years and having continued in judicial office for at least 10 years.

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[65] *Supra* n. 31, ss. 5(1) and 5(2).

[66] *Supra* n. 3, at 184.

RECOMMENDATION 28

That Provincial Court judges should be entitled to elect to hold supernumerary status for such period not exceeding five years as they determine at the time of the election; this term should not be renewable.

3. Inflation Indexing

The salaries of the federal judiciary are adjusted annually (between triennial Commissions) on the basis of the lesser of the percentage change in the Statistics Canada Industrial Aggregate Index or 7%.[67]

In addition, the Ontario Provincial Courts Committee in its 1988 Report recommended that Provincial Court judges' salaries in that province be adjusted effective April 1 of each year in *direct* proportion to the percentage of any annual increase in the national average of the Consumer Price Index (CPI) from the beginning to the end of the previous calendar year.[68] The Ontario Committee report specifically stated that there should *not* be a statutory ceiling (in dollar or percentage form) imposed on the application of the CPI. The Committee was of the opinion that any such ceiling, when utilized, would prevent the adjustment from accounting *fully* for price increases.

The Commission has considered the question of whether a guideline should be established with respect to the indexing for inflation of judicial remuneration. We are of the opinion that the matters which the independent committee considers in its determination of the appropriate quantum of remuneration are entirely within the discretion of the committee. Accordingly, as inflation would likely be considered by the committee in its deliberations, no specific guideline is needed with respect to it.

4. Finance

In the debate concerning judicial independence, it has been argued that judicial salaries (and other financial benefits) should be fixed by the Legislature (not the executive) and should be made a charge on the Consolidated Revenue Fund rather than requiring annual appropriation. However, as noted at the beginning of this Chapter, the Supreme Court of Canada, in the *Valente* decision, held that neither the fixing of judicial salaries by the Legislature nor the financing of such salaries as a charge on the Consolidated Revenue Fund was essential for compliance with the minimum standards of judicial independence.[69] In view of this decision and the Commission's own recommendation for an independent judicial compensation committee, we have decided that there is no essential difference (with respect to judicial independence) between treating judicial remuneration as a matter for yearly appropriation or as a charge on the Consolidated Revenue Fund. As the Supreme Court has pointed out, it is, practically speaking, impossible that the Legislature would refuse to vote the annual appropriation for salaries in order to have control over the judiciary.[70] Accordingly, no recommendation is necessary.

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[67] *Judges Act*, R.S.C. 1985, c. J-1, s. 25(1). The Industrial Composite of Wages was used previously, but this was amended to reflect the fact that the Composite is no longer kept by Statistics Canada.

[68] In its rejection of the Industrial Aggregate, the Committee stated: "There is no *a priori* reason to suppose that the market forces that affect industrial wages in a given year have any legitimate application to the salaries of judges". At present, the most representative measure of changes in purchasing power in Canada is the CPI: *supra* n. 17, at 74-76.

[69] *Supra* n. 3, at 185-186.

[70] *Supra* n. 3, at 186.

5. Other Judicial Officers

There are, within Manitoba, a number of other judicial officers who are appointed and paid by the provincial Government. These are the masters of the Court of Queen's Bench, magistrates and justices of the peace, and members of numerous administrative tribunals and/or government agencies who exercise judicial functions (i.e. hear evidence on a case-by-case basis and make a decision by applying specific principles to the facts of the case before them). Although we have adverted to the possibility of the independent compensation committee's jurisdiction being extended to include these other judicial officers, we have decided that this issue is beyond the scope of the present review.

CHAPTER 5

DISCIPLINE

A. INTRODUCTION

The basic reason for any type of judicial discipline is to maintain public confidence in the judiciary by assuring the public that judges will abide by the duties of their office and that they will be brought to account if they do not.[1] A legal system can function only if the public accepts and abides by decisions rendered by the courts; anything that tends to weaken the public conviction that judges are fair and impartial must be avoided.[2]

In this Chapter, we will examine the historical background of the judicial disciplinary process, the method by which judges are presently disciplined in Manitoba, and the issues and options which arise in a consideration of a new judicial disciplinary process for Manitoba. We will consider and make recommendations on numerous issues: who should conduct the disciplinary proceedings, how such proceedings should be instigated, the investigative procedure to be employed, the grounds for disciplinary action or sanctions, and the procedural and adjudicative guidelines to be established for the conduct of disciplinary hearings. In considering these matters, our touchstone, as always, will be the minimum standards of judicial independence set out in Chapter 2. That is, security of tenure requires that judges be removed only for cause related to their capacity to perform judicial functions. Financial security requires that the right to remuneration be established by law and not be subject to arbitrary interference by the Executive in a manner which could affect independence.

B. HISTORICAL PERSPECTIVE

1. England

The oldest method for removing judges is through executive action.[3] Prior to the 18th century, English judges held their office at the King's pleasure, and before the passage of the *Act of Settlement* of 1701[4], whenever a King died, it was likely that all judges would be replaced by new judges appointed by the new Monarch[5].

The *Act of Settlement* put an end to the removal of judges at the Monarch's whim, at least in respect of superior court judges. The Act provided "that Judges' Commissions be made

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[1]R.J. Martineau, "Disciplining Judges for Nonofficial Conduct: A Survey and Critique of the Law" (1981), 10 U. Balt. L. Rev. 225 at 227; M. Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsibility" (1983), 31 Am. J. Comp. L. 1 at 46.

[2]Martineau, *supra* n. 1, at 227.

[3]E.J. Schoenbaum, "A Historical Look At Judicial Discipline" (1977), 54 Chi.-Kent L. Rev. 1 at 2.

[4]*Act of Settlement*, 12 & 13 Will. 3, c. 2, s. 3 (1701).

[5]*Supra* n. 3, at 2.

quamdiu se bene gesserint, that is for so long as they conduct themselves well, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them."[6] Address is a formal request to the Executive by both Houses of the legislative body requesting the Executive to perform some act (in this case, remove a judge from office). There is no trial, nor does the judge in question have a right to present a defence as he would have in an impeachment trial. The address procedure has rarely been employed in England, and has virtually never been used successfully.[7]

The use of impeachment as a disciplinary tool was first seen in the latter part of the 14th century when the House of Commons prosecuted the most powerful and highest officers of the Crown before the House of Lords.[8] Impeachment was originally a method employed by Parliament to remove high officers who had misled the King. It is a criminal proceeding against a public officer, before a quasi-political court, instituted by a written accusation called "Articles of Impeachment". In an impeachment there is a specification of charges voted by the lower House of the Legislature, and the charges are then tried in the upper House, which sits for this purpose as a court. Removal by the upper House usually requires a two-thirds vote.[9] Although impeachment has its origins in English law, it only found popularity as a method of judicial removal in the United States (primarily during the early history of that country).

Three common law methods of judicial removal were also developed in England. The first of these is a process known as *scire facias*, which was a suit to repeal the letters patent by which the judge held his office. That is, since judges were appointed for life during good behaviour, their position could be forfeited by misbehaviour.[10] *Scire facias* has never been employed in England for the removal of a superior court judge, but has been used for forfeiture of other offices held during good behaviour.[11]

The second method was the removal of a person holding office during good behaviour either upon criminal conviction for a misdemeanour in the exercise of his official duties, or for an offence which, though unconnected with official duties, was so infamous as to render the person unfit to hold public office. Criminal conviction resulted in the repeal of the patent by which the office was held and entitled the Crown to seize the office without further proceedings.[12]

Finally, the third common law method used in England to discipline judges is found in the power of the Lord Chancellor. Lower court judges are removable by the Lord Chancellor for inability or misbehaviour, and justices of the peace are also removable by the Lord Chancellor, at his pleasure (in practice, only for good reasons such as conviction of a criminal offence). This power has existed ever since the *County Courts Act* was enacted in 1888.[13]

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[6]*Act of Settlement*, 12 & 13 Will. 3, c. 2, s. 3 (1701).

[7]*Supra* n. 3, at 4; D.B. Casson and I.R. Scott, "Great Britain" in *Judicial Independence: The Contemporary Debate* (S. Shetreet and J. Deschênes eds. 1985) 141 at 148.

[8]*Supra* n. 3, at 5.

[9]*Supra* n. 3, at 5.

[10]*Supra* n. 3, at 14.

[11]*Supra* n. 3, at 14.

[12]*Supra* n. 3, at 14.

[13]*County Courts Act*, 1888, 51 and 52 Vict., c. 43, s. 15; Casson and Scott, *supra* n. 7, at 148.

2. United States

The use of address to the Executive as a method of removal of judges for misbehaviour found its way into some of the state Constitutions following the American Revolution.[14] Although address had been authorized as a means for removing judges in 28 states by 1922, it has seldom been used.[15] In fact, there has been no evidence of the use of address since 1940.[16]

Impeachment became the method most commonly authorized for dealing with judicial misconduct in the early history of the United States.[17] However, a survey taken in 1960 recorded that in 40 states, as far back as could be recalled or determined, impeachment procedures had been only invoked in 17 states in a total of 50 instances, resulting in 19 removals and 3 resignations.[18] Like address, impeachment has been described as ineffective, cumbersome and subject to abuse by persons who wish to use it for political retaliation. It has been criticized as an "all or nothing approach"; that is, the impeached judge is either removed or not punished at all.[19]

A third method of judicial discipline used in the United States is recall. This is a procedure by which judges and certain other public officials may be removed from office by means of a special vote of the electorate. The process begins by the submission of a petition, signed by a certain percentage of qualified voters, requesting that a recall proposition in respect of a particular judge be placed on the ballot. It was adopted in 7 states, primarily in the first 25 years of this century, and has been used only sparingly since then. In fact, with the exception of the recall of a Wisconsin judge in September 1977, the last prior occurrence of such an event was in California in 1932.[20] Recall has been criticized because it is expensive and difficult to obtain the number of signatures required on the recall petition. Furthermore, as the electorate might be uninformed about the qualifications of a judge, a recall election may focus solely upon political considerations.[21]

Finally, the removal of judges by popular vote developed in the United States in the early part of the 19th century. By the time of the United States Civil War, 24 of the 34 states had elected judiciaries.[22] The use of election (and by implication removal) of judges by popular vote has been criticized on several grounds. Some commentators point out that the electorate simply does not obtain enough information to decide intelligently upon a candidate's qualifications, that there is often a tremendous lack of interest in judicial elections, that persons who vote do so along the lines of party consideration (not the qualifications of the candidate), and the selection of candidates is done behind closed doors by the policy makers of the political party sponsoring such candidates. One author states that "the worst of judges may run a superb campaign and be re-elected".[23]

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[14] *Supra* n. 3, at 4.

[15] *Supra* n. 3, at 4.

[16] W.T. Braithwaite, *Who Judges the Judges? A Study of Procedures for Removal and Retirement* (1971) 13.

[17] *Supra* n. 3, at 5; L.L. Lewis, "Judicial Discipline, Removal, and Retirement", [1976] Wisc. L. Rev. 563 at 564.

[18] *Supra* n. 16, at 13.

[19] *Supra* n. 3, at 7.

[20] *Supra* n. 3, at 8.

[21] B.C. Yankelewitz, "State Judicial Disciplinary Commissions and Proceedings: Developing Administrative and Legal Standards for Evaluating Judicial Misconduct" (1979), 10 Rut.-Cam. L.J. 685 at 686.

[22] *Supra* n. 3, at 9.

[23] *Supra* n. 3, at 9.

The disadvantages associated with all of the traditional procedures of judicial removal in the United States have led to the establishment of state judicial conduct commissions. The first such commission was established in 1960 in California. Today all 50 states, the District of Columbia and the federal Circuit Courts have some mechanism for receiving, investigating, and adjudicating complaints against judges.[24] Judicial discipline commissions or councils will be examined later in this Chapter.

3. Canada

The protection of judicial independence afforded to English judges by the *Act of Settlement* of 1701 did not take effect at the same time in the British colonies in North America. Prior to 1774, the King had full power and responsibility to prescribe the nature of colonial governmental institutions, including the judiciary.[25] So, in the early 18th century, it was considered that the British Parliament was referring only to English superior court judges in the *Act of Settlement*, and did not intend to extend this measure of judicial independence to the colonies.[26] However, progress was made towards establishing the independence of the judiciary. In Upper Canada in 1834, a statute respecting the Court of King's Bench declared that judges would hold office during good behaviour, but were rendered liable to removal by joint address of the Legislative Council and Assembly (of Upper Canada), subject to appeal to the King in Council.[27] Later, as a result of Lord Durham's Report, Acts passed in both Lower and Upper Canada provided that Superior Court judges would hold office during good behaviour, not during pleasure, and could only be removed on a joint address of the Legislative Council and Assembly.[28]

The development of judicial independence in Nova Scotia proceeded more smoothly than in Upper or Lower Canada and in some respects more rapidly. As early as 1789, a Nova Scotia statute stated that judges of the Supreme Court of Nova Scotia should be removed either at the pleasure of His Majesty, or upon the joint address of Nova Scotia's Council and Assembly to the Governor, Lieutenant Governor or Commander in Chief for the time being.[29] In 1848, a Nova Scotia statute entitled *An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal*[30] provided that the judges mentioned would hold office during good behaviour, subject to removal by the Governor upon the address of the Legislative Council and House of Assembly.

Thus, on the eve of Confederation, security of tenure for judges in the British North American colonies had already been achieved.

The judicial provisions of the *Constitution Act, 1867* (discussed in Chapter 2) make it clear that the provinces and the new nation of Canada were to follow the model of judicial independence afforded to the English judiciary. They provide that judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on

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[24]Y. Begue and C. Goldstein, "How Judges Get Into Trouble: What They Need to Know About Developments in the Law of Judicial Discipline" (Fall 1987), 26 Judges' J. 8 at 8-9.

[25]W.R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769, 1139 (pts. 1 and 2) at 1140.

[26]*Supra* n. 25, at 1141.

[27]*Supra* n. 25, at 1150.

[28]*Supra* n. 25, at 1151.

[29]*Supra* n. 25, at 1152-1154.

[30]*An Act to render the Judges of the Supreme Court, and the Master of the Rolls, independent of the Crown, and to provide for their removal*, 11 Vict., c. 21 (N.S.).

address of the Senate and House of Commons. Thus, England's *Act of Settlement* model was preserved in our *Constitution*, at least with respect to Superior Court judges.[31] Similar security of tenure has been extended to Manitoba's Provincial Court judges by section 3(3) of *The Provincial Court Act* and, of course, by the Supreme Court's decision in *Valente* v. *The Queen*.

Failure to show the required "good behaviour" has generally been defined as an improper exercise of the office, neglect or refusal to perform the duties of the office, or conviction for a serious criminal offence involving moral turpitude.[32] This definition does not embrace inability to perform the duties of the office because of age or mental or physical illness, nor does it include off-the-bench behaviour (except behaviour resulting in a criminal conviction). No Canadian judge has yet to be removed by an address of both Houses of Parliament.[33] In fact, the last Superior Court judge to be subjected to removal proceedings was Leo Landreville, in 1966. The address procedure was not necessary in that case, as Landreville submitted his resignation when the then Minister of Justice, Pierre Trudeau, announced that a Resolution would be introduced into Parliament to adopt a joint address requesting the judge's removal.[34]

England's *Act of Settlement* of 1701, which provides for removal of superior court judges by address, has influenced the removal procedure for the judiciary in Canada. Address, like the more popular U.S. approach of impeachment, is an all or nothing method. That is, the judge is either removed or (if the address resolution is not passed) allowed to continue in office. The inefficiency of the address process, combined with the infrequency of its use, have led Canadian governments (like their American counterparts) to create judicial councils or commissions for the receipt, investigation and adjudication of complaints against members of the judiciary.

C. ISSUES AND RECOMMENDATIONS

1. The Current Judicial Discipline Process

Provincial Judicial Councils are a development of the last 20 years.[35] A judicial council is a body whose membership may include judges, lawyers and (sometimes) lay people, created and given powers by relevant legislation. It usually has two functions: first, considering complaints of misconduct or misbehaviour lodged against members of the judiciary and, secondly, passing upon the qualifications of candidates for appointment to the Bench. In Canada, nine of the ten provinces and both of the two territories now have Judicial Councils. Only Prince Edward Island stands out from this trend. There is also a Judicial Council for federally-appointed judges, created in 1971.

Manitoba's Judicial Council was created in 1972.[36] It is composed of the Chief Justice of the Court of Queen's Bench (or designate), three judges of the Provincial Court (one of whom may be the Chief Judge) designated by the Attorney General, the President of the Law Society of Manitoba (or designate), the President of the Manitoba Branch of the Canadian Bar Association (or designate), and three other members appointed by the Lieutenant Governor in Council.[37]

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[31] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 99.

[32] P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) 176.

[33] *Ibid.*

[34] *Supra* n. 32, at 176-177.

[35] P. McCormick, "Judicial Councils for Provincial Judges in Canada" (1986), 6 Windsor Year B. Access Justice 160.

[36] *Ibid.*

[37] MAN, s. 27(1).

The function of Manitoba's Judicial Council is to receive and deal with complaints regarding conduct unbecoming a judge or neglect of duty by a judge of the Provincial Court, or the ability or capacity of such a judge to perform his duties.[38] As discussed earlier in this Report, it does not play a role in the appointment of provincial judges.

In order for a matter to come before the Judicial Council, a complaint must be made. In Manitoba, complaints must be made in writing to the Chief Justice of the Court of Queen's Bench, *not* the Chief Judge of the Provincial Court; the complaints must be in such form and in such manner as the Judicial Council may require. Once a complaint is made, it may not be withdrawn unless the Judicial Council consents.[39] The Chief Justice examines the complaint and refers it to the Judicial Council.[40]

Upon receiving a complaint, the Judicial Council has two options. If a majority of its members consider the complaint to be frivolous or vexatious, the complaint will be dismissed and the complainant will be advised accordingly. However, if the complaint is not dismissed, the Judicial Council may refer the matter to any person whom it deems fit for an investigation and report.[41]

There is another way in which a complaint concerning a judge may reach the Judicial Council. *The Provincial Court Act* provides that the Chief Judge of the Provincial Court shall conduct an investigation respecting the fitness of a judge, magistrate or justice of the peace where he considers the investigation is necessary or he is directed to do so by the Attorney General. On completion of this investigation, the Chief Judge has two options. He or she can:

(a) take corrective action that he or she considers necessary, using powers available under *the Provincial Court Act*; or

(b) file a report of the investigation with the Judicial Council, which will consider the report as if it was the report of a person who had been assigned to investigate a complaint made to the Judicial Council.[42]

Whether the Chief Judge employs corrective action or forwards a report of the investigation to the Judicial Council, he or she is required to submit a report to the Attorney General describing the investigation, the relevant facts, the findings, any corrective action taken, and whether or not a report has been filed with the Judicial Council.[43]

Once the Judicial Council receives a report of a complaint against a judge, through one of the two methods described above, it must consider the report and essentially has the same two options referred to earlier. It may, if a majority of its members consider the complaint to be frivolous, vexatious or unfounded, or to have been resolved in a manner satisfactory to the Council, dismiss the complaint and advise the complainant accordingly, or it may decide to hold an inquiry in respect to the complaint.[44]

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[38]MAN, s. 28(1).

[39]MAN, ss. 28(2) and (3).

[40]Telephone interview with Chief Justice B. Hewak of the Court of Queen's Bench of Manitoba, March 17, 1989.

[41]MAN, ss. 29(1) and (2).

[42]MAN, ss. 8(3) and (4).

[43]MAN, s. 8(4).

[44]MAN, s. 31(2).

Where a complaint is being investigated for the Judicial Council, or the Judicial Council proceeds to hold an inquiry in respect of a judge, the Chief Judge of the Provincial Court is authorized to suspend the judge pending the result of the investigation or inquiry.[45] If a judge is so suspended, the Judicial Council may order that (pending determination of the inquiry) the judge not receive any salary.[46] Thus, it is the Chief Judge who decides whether or not a judge should be suspended during an inquiry or investigation, but it is the Judicial Council which can order that the judge not receive any salary during the suspension.

There is one other way in which an inquiry may take place before the Judicial Council. Where the Judicial Council receives a request from the Attorney General to hold an inquiry into the conduct, ability or capacity of or neglect of duty by a judge, the Judicial Council *must* hold an inquiry.[47] In this situation, there is clearly no investigative or screening process which takes place before the inquiry is held. The Judicial Council has no discretion; it must hold the inquiry.

If the Judicial Council decides to hold an inquiry (or, by virtue of a request from the Minister, is required to hold an inquiry), it must give 15 days' notice in writing to the judge in respect of whom the inquiry is to be held. The inquiry will be held in public unless the Judicial Council determines that, in the public interest, all or part of the inquiry should be held in camera.[48] The judge in respect of whom the Council is holding an inquiry is allowed to attend and has the right to counsel, to present evidence and to cross-examine witnesses. Both the Judicial Council and (where he or she requests that an inquiry be conducted) the Attorney General may appoint legal counsel to appear on their behalf at the inquiry, and to present evidence.[49]

Other than the provisions respecting legal counsel and the presenting of evidence, the Judicial Council is free to determine its own procedures and conduct inquiries in such manner as it considers appropriate.[50] The Council does not employ standard rules. It determines procedure on a case-by-case basis, not in a purely discretionary fashion, but with due consideration of the rules of natural justice.[51]

After holding an inquiry, the Judicial Council may:

(a) dismiss the complaint;

(b) suspend the judge; or

(c) reprimand the judge.[52]

The Council may also make such order as to costs as it deems advisable, and a record of the proceedings of the inquiry must be forwarded to the Chief Judge and to the Attorney General. The decision of the Judicial Council must be in writing, and must be served personally upon the

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[45]MAN, s. 30.

[46]MAN, s. 36(2).

[47]MAN, s. 31(1).

[48]MAN, s. 32.

[49]MAN, s. 33.

[50]MAN, s. 27(3).

[51]Telephone interview with Chief Justice B. Hewak of the Court of Queen's Bench of Manitoba, March 17, 1989.

[52]MAN, s. 36(1).

judge who is the subject of the inquiry.[53] The judge then has 30 days after the date of service of the order or decision on him to appeal the order or decision to the Manitoba Court of Appeal upon any issue of fact or law or mixed fact and law.[54] If the appeal to the Court of Appeal is dismissed or the time for appeal has expired, the Judicial Council must provide the complainant with a copy of the order or decision and may make the order or decision public.[55]

The Judicial Council does not have the power to remove a judge from office. Only the Lieutenant Governor in Council (the provincial Cabinet) may remove a provincial judge from office and revoke his appointment and it may do so only where:

- .. the Judicial Council, after an inquiry, suspends the judge from office; and
- the judge's appeal of the suspension is dismissed, or the time for appeal has expired.[56]

2. Recommended Disciplinary Structure

The disciplinary system used in Manitoba (and in virtually every other Canadian jurisdiction) is essentially a one-tier or unitary system. That is, a single board or commission (the Judicial Council) carries out the combined functions of investigating complaints, bringing formal charges, holding hearings and making findings of fact.[57]

In our view, this unitary system is inconsistent with notions of fundamental justice and is not acceptable. It fails to ensure that the person or body which carries out the investigation (and determines that charges should be laid against the judge) does not later hear and adjudicate upon the charges which he or she decided to lay. Imagine the protest which would greet a criminal justice system where the prosecutor and judge were the same person!

Furthermore, our present judicial disciplinary system contains no mechanism for preventing persons from taking part in the hearing of charges against themselves. For example, there is no prohibition on the Chief Judge of the Provincial Court investigating or even adjudicating upon a complaint against himself or herself.

These fundamental flaws in our present system highlight the need for a two-tier judicial disciplinary structure. Under such a scheme, the first tier investigates complaints and decides whether or not to bring formal charges. The second tier adjudicates the formal charges, makes factual and legal findings, and determines the disposition of the charges. The second tier is usually responsible for final disposition of the case; however, an appeal may be provided for from the decision of the second tier.[58]

It is vital to the interests of judicial independence and the integrity and impartiality of the Bench that there be a clear distinction between the investigative (including prosecutorial) and

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[53]MAN, s. 36(1).

[54]MAN, s. 37.

[55]MAN, s. 38.

[56]MAN, s. 39.

[57]J.M. Shaman and Y. Begue, "Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process" (1985), 58 Temp. L.Q. 755 at 756-757, note 10.

[58]*Ibid.*; J.H. Gillis and E. Fieldman, "Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-tier Approach" (1977), 54 Chi.-Kent L. Rev. 117 at 118.

adjudicative stages of the judicial disciplinary process. That is, a two-tier system should be employed in Manitoba. While we recognize that there are some problems with the two-tier model, we are convinced that the advantages of a system which by its very nature prevents persons who investigate charges from later acting as the judges of those charges are so great that they surmount any objections which opponents of the two-tier system may raise. In our view, most of these objections may be obviated in the design of the disciplinary system. We therefore recommend:

RECOMMENDATION 29

That there be a clear division between the investigative/prosecutorial and adjudicative functions in judicial discipline proceedings and that the two functions be dealt with by different bodies.

3. Implementing a New Disciplinary Procedure

(a) Introduction

In this section, we will examine the major issues of the judicial disciplinary procedure. We have divided the analysis into 6 major areas:

- receipt and investigation of complaints;
- the Judicial Inquiry Board;
- the Judicial Council;
- suspension of judge pending investigation or inquiry;
- proceedings in public or in camera;
- disposition of complaints.

As noted earlier, all of the Judicial Councils in Canada are essentially unitary in structure. That is, there is not a complete separation of the investigative and adjudicative functions. As we have already recommended that this separation be made, it is not necessary (or productive) to examine all of the Canadian Judicial Councils. Instead, we have taken note of the features of other jurisdictions' discipline procedures which are useful or appropriate, and have incorporated similar provisions into a new system which (we believe) is superior to those presently in use in Canada.

(b) Receipt and investigation of complaints

In order to achieve a clear distinction between the investigative and adjudicative aspects of the disciplinary process, it is essential that the person or board which receives and investigates complaints does not take any part in the adjudication of those complaints. Consequently, the present system of requiring complaints to be made to the Chief Justice of the Court of Queen's Bench (and allowing the Chief Justice to screen those complaints) cannot continue, because the Chief Justice is also, by his or her office, a member of the Judicial Council which will hear the inquiries into the complaints. Similarly, the Chief Judge of the Provincial Court cannot continue to investigate a complaint and then participate in its adjudication. Instead, a new system for the receipt and investigation of complaints against judges should be implemented.

Clearly, our legislation must contain a provision which disqualifies not only the Chief Judge from investigating and later adjudicating upon a complaint, but also disqualifies any other person who takes part in the investigation of a complaint from later participating in the actual hearing of that complaint.

Yet the importance of preserving some role for the Chief Judge cannot be overstated. The Chief Judge is in daily contact with the judges of the Provincial Court; he or she is both their supervisor and their leader. Lawyers and other participants in the court process may have concerns of a less serious nature with respect to provincial judges; they may want to discuss these concerns with an appropriate person on an informal and confidential basis. The Chief Judge is ideally suited to act in such situations.

At the same time, we feel it is inappropriate to place the investigative responsibility for all complaints squarely on the shoulders of the Chief Judge. Such a situation may give rise to several difficulties, including:

- the Chief Judge may be placed in a difficult position, if he or she has to thoroughly investigate (and perhaps charge) fellow judges who are also friends;

- the Chief Judge may encounter animosity from other judges as a result of being the investigator (breeding discord on the Bench);

- the use of the Chief Judge as investigator/ prosecutor could give rise to a public perception that complaints against judges are being dealt with in a cursory, "closed door" fashion.

In order to deal with the above concerns, we must recommend a role for the Chief Judge which preserves his or her ability (and responsibility) to respond immediately to complaints of a less serious nature, while at the same time eliminating any perception of "private" justice. To accomplish such an objective, we have decided to recommend a modified two-tier system, a "three-tier" system, if you will. The Chief Judge would act as the first tier, dealing with and screening out minor complaints. The major investigative and prosecutorial authority (including the discretion as to the laying of charges) would be conferred on a new, completely independent investigative body, which would act as the second tier of the three-tier system. This body would have two major functions:

- to investigate matters which the Chief Judge could not or should not investigate, such as complaints of a serious nature or complaints against the Chief Judge;

- to act as a sort of appellate body for decisions of the Chief Judge which are not accepted by either the complainant or the judge in question (or both).

In order to prevent perceptions of an "old boy's" network, there must be some form of accountability for the Chief Judge's initial handling of the complaint. That is, either the complainant or the judge in question should be allowed to refer the Chief Judge's resolution of the dispute to the investigative body. Thus, the Chief Judge should attempt to resolve complaints consensually; if the Chief Judge is unable to do so, the matter should be referred to the investigative body. In effect, the Chief Judge would act as mediator in a "three-tier" disciplinary process. If either party did not agree with the Chief Judge's disposition, there is the availability of an alternative recourse to the investigative body. Furthermore, if the complaint was against the Chief Judge, the complainant would proceed directly to the investigative panel. Finally, in serious matters, where the risk of public perception of "whitewash" or "closed door justice" is greatest, complaints would be made directly to the investigative body.

We therefore recommend:

RECOMMENDATION 30

That The Provincial Court Act be amended to establish a new judicial disciplinary process having three tiers:

- ***(a) the Chief Judge (to deal with minor matters);***
- ***(b) an investigative body (called the Judicial Inquiry Board) to investigate and prosecute more significant matters and, where requested, to consider complaints dealt with by the Chief Judge; and***
- ***(c) an adjudicative body (called the Judicial Council) to hear and determine charges brought by the Judicial Inquiry Board.***

RECOMMENDATION 31

That complaints (other than those against the Chief Judge) be directed to the Chief Judge of the Provincial Court and that complaints respecting the Chief Judge be directed to the Judicial Inquiry Board.

RECOMMENDATION 32

That the Chief Judge deal with complaints by:

- ***(a) attempting to resolve the matter informally;***
- ***(b) advising the complainant that there is no basis for a complaint or that a more appropriate avenue should be pursued (such as an appeal from the judicial decision giving rise to the complaint); or***
- ***(c) immediately referring the complaint to the Judicial Inquiry Board.***

RECOMMENDATION 33

That a complainant or judge who is dissatisfied with the disposition of the complaint by the Chief Judge be entitled to take the matter to the Judicial Inquiry Board.

RECOMMENDATION 34

That there be an onus upon the Chief Judge to inform all complainants that, if they are dissatisfied with a disposition of the complaint by the Chief Judge, they may take the matter to the Judicial Inquiry Board.

RECOMMENDATION 35

That the Chief Judge shall not deal with a complaint and shall instead promptly refer it to the Judicial Inquiry Board where it is alleged that:

(a) a judge has committed an indictable offence; or

(b) a judge has been guilty of conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Currently, complaints to the Judicial Council must be in writing, and must be signed by the complainant. This is a useful provision. It provides information in support of the allegations against the judge (a phone call is insufficient) and it protects against anonymous "poison pen" complaints. We believe the provision should be preserved. Consequently, the Commission recommends:

RECOMMENDATION 36

That complaints to the Chief Judge and the Judicial Inquiry Board be in writing and be signed by the complainant.

Logically, there is no reason why either the Chief Judge or the Judicial Inquiry Board should wait until a formal complaint is made. If a problem comes to their attention (from any source) which appears to merit investigation, they should be authorized to look into the matter without delay. We therefore recommend:

RECOMMENDATION 37

That the Chief Judge be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a judge which comes to his or her attention; and that the Judicial Inquiry Board have the same power.

Another important issue is confidentiality of the complaint. It is essential that the receipt and investigation of complaints be conducted in a manner which is designed to encourage complainants to come forward without fear of reprisal from the Bench while at the same time protecting the judge in question from sensationalistic publication of unfounded allegations. However, it should be recognized that complete confidentiality is impossible to maintain. Judicial Councils often have authority to disclose the identities of complainants and witnesses to the judges being investigated. Furthermore, even if such disclosure is not permitted, the judge is allowed some form of discovery power (either during the investigative or adjudicative stage) and is entitled to notice of the nature of the charges (to be able to know the case he or she has to meet).[59] Therefore, the judge will likely be able to guess who the complainant is. Finally, if charges are filed, we contemplate that this would be a matter of public record. Consequently, everyone will know who the complainant is, and will find out the details of the complaint. It is incorrect and misleading to state to the public (and to the judge) that the identity of the complainant and the nature of the complaint will remain confidential. We recommend:

RECOMMENDATION 38

That, although complainants should, where they so desire, be accorded the maximum amount of confidentiality possible, it must be recognized and explained that it will be difficult to maintain confidentiality at the investigative stage and impossible to maintain at the adjudicative stage.

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[59] *Supra* n. 57, at 760.

Finally, we note that in order for a judicial disciplinary process to be of use, its existence must be known. A complaint process which is unknown to the public is as effective as no complaint process at all. Accordingly, the Commission recommends:

RECOMMENDATION 39

That information respecting the discipline and complaint process should be made available to the public.

(c) The Judicial Inquiry Board

The second tier or level of our recommended judicial disciplinary process is the Judicial Inquiry Board. This is the body which will have the primary responsibility for investigating major complaints, laying charges where appropriate and prosecuting them before the Judicial Council. In order for it to operate quickly and effectively, we believe that it should be composed of a small number of persons. Furthermore, it should be representative of the perspectives of the public, the legal community and the judges themselves, without being dominated by any one of these points of view.

Of course, the Chief Judge of the Provincial Court cannot be a member of the investigative body. The Chief Judge acts as the first tier in the disciplinary process; he or she cannot be permitted to act in a further capacity, particularly when the investigative body will be hearing complaints which the complainants or the judges in question felt were mishandled by the Chief Judge, or which are against the Chief Judge.

We recommend:

RECOMMENDATION 40

That the Judicial Inquiry Board be comprised of three persons:

(a) ***a lawyer appointed by the Lieutenant Governor in Council;***

(b) ***a person who is not a lawyer, judge or retired judge, also appointed by the Lieutenant Governor in Council; and***

(c) ***a person named by the provincial judges. This member shall not be the Chief Judge. In the event that this member becomes the subject of a complaint to the Judicial Inquiry Board, he or she shall be replaced by another person named by the provincial judges until the complaint is disposed of.***

The Judicial Inquiry Board should be permanently established, ready and able to receive complaints against judges at any time. It is equally important to prevent the members of the investigative body from serving overly lengthy terms which might diminish both their interest in and the effectiveness of the disciplinary process. More significantly, acting as a prosecutor of judges will be a difficult and taxing responsibility, which ought to be rotated over time. In light of these concerns, the terms of appointment of the members of the Judicial Inquiry Board should

be limited, and those members should be eligible to have their terms renewed once only. Accordingly, the Commission recommends:

RECOMMENDATION 41

That the members of the Judicial Inquiry Board hold office for terms of three years.

RECOMMENDATION 42

That the members of the Judicial Inquiry Board be eligible to have their terms renewed once only.

Some provinces provide the investigative agents of the judicial disciplinary body (whether that agent be the Chief Judge of the Provincial Court, or any person selected by the Judicial Council, or a committee of the Judicial Council itself) with the protection and powers of legislation equivalent to the provisions of *The Manitoba Evidence Act* concerning commissioners appointed for public inquiry.[60] A commissioner appointed under *The Manitoba Evidence Act* has the power to subpoena witnesses, to require those witnesses to give evidence on oath or affirmation and to produce documents and things deemed necessary for the full investigation of the matter, to enter onto and inspect any land, building, works or property if that will assist in the inquiry, to issue warrants if a witness fails or refuses to appear at the time and place specified in the subpoena or summons and to command or engage the services of police officers or constables, accountants, engineers, technical advisers or other experts to assist with and even conduct the inquiry (as a deputy).[61] The commissioners are granted the same protection and privileges in respect of any action brought against them for any act done or omitted to be done in the execution of their duties as are granted to the judges of the Court of Queen's Bench.[62]

Our *Provincial Court Act* currently grants such powers and protection to all members of the Judicial Council. In our view, the powers and protection which are provided to the members of the Judicial Council should also be provided to the persons who conduct the investigation. Clearly, an investigative agent who lacks powers such as those set out above will have a difficult (if not impossible) task of adequately examining and investigating the judge in question. Furthermore, the Judicial Inquiry Board should be able to retain counsel to act as prosecutors, and should also be authorized to hire investigative agents to assist in the gathering of information from the complainant, witnesses, and other sources. The Commission therefore recommends:

RECOMMENDATION 43

That the members of the Judicial Inquiry Board and persons who are employed or retained by them as investigators have all of the powers and protection of commissioners appointed under The Manitoba Evidence Act.

RECOMMENDATION 44

That the Judicial Inquiry Board have the power to engage counsel and agents as they determine appropriate.

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[60] *The Manitoba Evidence Act*, C.C.S.M. c. E 150, ss. 83-94.

[61] *The Manitoba Evidence Act*, C.C.S.M. c. E150, ss. 83-93.

[62] *The Manitoba Evidence Act*, C.C.S.M. c. E150, s. 87. This issue will be explored in greater detail in the Chapter on "Judicial Immunity".

In a two-tier (or, in our case, three-tier) disciplinary system, the investigative body (the Judicial Inquiry Board) is usually unable to impose private or informal sanctions (i.e. dispose of the matter on its own). The reason for this is that the investigative board is generally limited to investigating, not disposing of cases; only the adjudicative board can dispose of cases after formal charges are filed (and the matter becomes public).[63] Private or informal sanctions may be abused; secrecy fosters flexibility, but it also increases the risk and certainly the perception of favouritism and inconsistent application of standards. While secrecy may foster flexibility in the disciplinary process, it also increases the risk of abuse that the members of the Judicial Council themselves may not be able to either perceive or control.[64]

Therefore, we feel that the Judicial Inquiry Board should not be able to impose private dispositions on the parties unless both the complainant and the judge involved consent. The requirement of the complainant's consent alleviates the risk of abuse (if the complainant feels the disposition is lax or biased, he or she need only refuse it) and it protects the judge against arbitrary or unreasonable decisions by the investigative body. Furthermore, consent is a useful device in borderline cases. If the complainant is being unreasonable, and refuses a fair or appropriate disposition, the Judicial Inquiry Board may elect simply not to lay charges against the judge. Conversely, if the judge is being unreasonable, and does not accept the sanctions proposed by the Judicial Inquiry Board, he or she may find that charges are filed and the matter is proceeding to an inquiry before the Judicial Council.

We therefore recommend:

RECOMMENDATION 45

That, upon receipt of a complaint (or upon initiation of an investigation on its own motion), the Judicial Inquiry Board have the power to:

(a) investigate the matter;

(b) informally resolve the matter, if it can obtain the agreement of the judge in question and the complainant (where there is one);

(c) lay charges of misconduct before the Judicial Council;

(d) not lay charges;

(e) prosecute any or all charges laid by it;

(f) stay charges laid by it.

As recommended earlier, the Judicial Inquiry Board is to be composed of three members, each representing the interests of different groups. It is not necessary that their decisions be

[63]Gillis and Fieldman, *supra* n. 58, at 132.

[64]*Supra* n. 57, at 765; R.G. Cohn, "Comparing One- and Two-tier Systems" (1979), 63 Judicature 244 at 247. Nonetheless, even if private reprimands or other more minor sanctions are not formally available in a two- (or three-) tier system, minor complaints will always be "screened-out" by the investigative body (a form of disposition). Furthermore, the mere fact that an investigation is taking place into his or her conduct will have the effect of warning a judge to change his or her behaviour.

unanimous; the decision of a majority of the members of the Board should be sufficient. We recommend:

RECOMMENDATION 46

That decisions of the Judicial Inquiry Board be made by a majority of its members.

In order to prevent unwarranted damage to a judge's reputation, investigations by the Judicial Inquiry Board should be confidential and its deliberations as to whether to lay charges should take place in camera. However, once the Judicial Inquiry Board decides to lay charges, we believe that the matter should become public. We recommend:

RECOMMENDATION 47

That the filing of charges by the Judicial Inquiry Board be a matter of public record.

The key point of the two-tier system (a modified version of which we have recommended) is that it completely separates investigation from adjudication. Responsibility for the investigation of complaints and laying or not laying of charges is vested in one independent and impartial body. It is essential that the decisions of this body not be interfered with or influenced.[65] Therefore, we recommend:

RECOMMENDATION 48

That the decision to lay charges, not lay charges, or stay charges be within the sole discretion of the Judicial Inquiry Board and that no appeal lie from such decisions.

Finally, it is important, in situations where the Judicial Inquiry Board elects not to lay charges, that the complainant be informed of this and that he or she receive an explanation. After all, the silence of the Judicial Inquiry Board could be interpreted by members of the public as a suppression of the complaint, a "closed door" disposition. While these reasons need not be lengthy, it is essential that they state the basic reason for not proceeding (for example, minor matter, insufficient evidence, matter properly dealt with via the appeal route, etc.). Therefore, the Commission recommends:

RECOMMENDATION 49

That, where the Judicial Inquiry Board decides not to lay charges against a judge, it give a written explanation of its decision to the complainant.

(d) The Judicial Council

We now deal with the Judicial Council, the body which will adjudicate on charges brought by the Judicial Inquiry Board against provincial judges. All of Canada's Judicial Councils contain as members at least one judge, at least one lawyer, and (except in Nova Scotia) at least two lay persons (usually appointed by the Lieutenant Governor in Council).[66] Manitoba is

[65]This does not preclude the possibility of a superior court exercising its inherent jurisdiction to review decisions of inferior tribunals or boards.

[66]*Supra* n. 35, at 162. The Territories also make provision for lay persons on their Judicial Councils: YT, s. 17(1); NWT, s. 30(1) - limited to one lay person.

essentially similar to the other jurisdictions in regard to the composition of its Judicial Council. As indicated previously, Manitoba's Judicial Council is composed of the Chief Justice of the Court of Queen's Bench (or designate), three judges of the Provincial Court (one of whom may be the Chief Judge) designated by the Attorney General, the President of the Law Society of Manitoba (or designate), the President of the Manitoba Branch of the Canadian Bar Association (or designate), and three other members appointed by the Lieutenant Governor in Council. Although we are generally satisfied with the present composition of the Judicial Council, we believe that certain changes are appropriate to ensure good balance and to prevent the Council's domination by any one group.

The first change relates to the membership from the provincial judiciary. Currently, the Provincial Court judges who sit on the Judicial Council are chosen by the Attorney General.[67] There is no reason why the government, through the Attorney General, should select the members of the provincial judiciary who sit on the Judicial Council. The body which is best able to select provincial judges who have the greatest understanding of the circumstances facing the provincial judiciary (and the problems which the judges of that court may encounter) is a body which is representative of the provincial judiciary itself. That is, the Provincial Court Judges should be able to select their own representatives on the Judicial Council.

Secondly, in order to enhance the public's perception of the Judicial Council's impartiality, we would reduce the number of provincial judges sitting on it from three to two and add the Chief Justice of Manitoba (the Chief Justice of the Manitoba Court of Appeal) or designate as a member.

Another change which recommends itself to the Commission concerns the lay membership on the Judicial Council. Currently, our legislation provides for the appointment of three persons by the Lieutenant Governor in Council who shall hold office for such a term as may be specified by the Lieutenant Governor in Council.[68] It is under this provision that the lay persons on the Judicial Council are appointed. However, the legislation does not specify that these members of the Council must be lay persons. Therefore, it is possible that, under the current legislation, none of the members of the Judicial Council will be non-lawyers or non-judges. We believe that lay membership should be specifically provided for by the legislation.[69]

However, the number of lay persons on the Judicial Council should not be so great so as to provide those persons with a majority membership (as would be the case with any other group). Therefore, the quorum for the Judicial Council (which is presently five) should be increased to prevent any one group from constituting the majority of members actually present at the adjudication of complaints. We recommend:

RECOMMENDATION 50

That the Judicial Council be composed of nine persons, namely:

(a) the Chief Justice of Manitoba, or another judge of the Manitoba Court of Appeal designated by him or her;

(b) the Chief Justice of the Court of Queen's Bench of Manitoba, or another judge of that Court designated by him or her;

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[67]MAN, s. 27(1)(b).

[68]MAN, s. 27(1)(e).

[69]Québec and the Northwest Territories have adopted such an approach: PQ, s. 248(h); NWT, s. 30(1).

(c) two judges of the Provincial Court, named by the judges of that Court;

(d) the President of the Law Society of Manitoba or his or her designate;

(e) the President of the Manitoba Branch of the Canadian Bar Association or his or her designate; and

(f) three persons, who shall not be lawyers, judges or retired judges, appointed by the Lieutenant Governor in Council.

RECOMMENDATION 51

That the quorum for the Judicial Council be six.

It is essential for the complete separation of the investigative and adjudicative aspects of the disciplinary process that there be no overlapping between the membership of the Judicial Inquiry Board (the investigative level) and of the Judicial Council (the adjudicative level). Clearly, the Chief Judge of the Provincial Court, by virtue of the preliminary investigation which he or she will conduct with respect to complaints, must not sit on the Judicial Council either. Accordingly, the Commission recommends:

RECOMMENDATION 52

That the following persons not be members of the Judicial Council:

(a) the Chief Judge of the Provincial Court; and

(b) any sitting member of the Judicial Inquiry Board.

RECOMMENDATION 53

That any person who has participated in the receipt or investigation of a complaint against a judge of the Provincial Court shall not participate as a member of the Judicial Council in any proceeding of the Judicial Council respecting that complaint.

The Provincial Court Act presently provides that the chair of the Judicial Council shall be the Chief Justice of the Court of Queen's Bench, or his or her designate.[70] Since we have proposed that the Chief Justice of Manitoba be added to the Judicial Council, we similarly suggest that he or she, as the senior judicial officer on the Council, be its chair. We therefore recommend:

RECOMMENDATION 54

That the Chief Justice of Manitoba or his or her designate chair the Judicial Council.

We have already recommended the use of specific terms of appointment for members of the Judicial Inquiry Board. The reasons for change (to prevent stagnation of the Council membership, and to avoid placing such an onerous responsibility on individuals for excessive periods of time) are as applicable to the members of the Judicial Council as they were applicable

[70]MAN, s. 27(1)(a).

to the members of the Judicial Inquiry Board (except, of course, for those members who serve *ex officio*). Therefore, we recommend:

RECOMMENDATION 55

That the term of office of the members of the Judicial Council who do not sit ex officio (the lay people and the provincial judges) be three years.

RECOMMENDATION 56

That the members of the Judicial Council who do not sit ex officio be eligible to be reappointed once only.

(e) Suspension of judge pending investigation or inquiry

At present, the Chief Judge of the Provincial Court in Manitoba may suspend a judge of that Court where he or she is being investigated by the Judicial Council or the Judicial Council is proceeding to hold an inquiry in respect of a judge; however, no provision is made for the suspension of the Chief Judge himself or herself or for immediate suspension of judges prior to the commencement of an investigation.[71]

The adoption of our new disciplinary process raises complex questions with respect to the issue of suspension. First of all, should any suspension be permitted during the initial investigation? If there is to be no provision for immediate suspension, when should suspension be imposed? Who (i.e. which tier) should impose it?

We are of the opinion that there should not be any provision for suspension upon the making of a complaint or during an investigation. First (and most importantly), if the investigative body were permitted to impose such a sanction, it could easily appear to the public (and others) as a predetermination of guilt. Secondly, the Commission feels that allegations which appear to require immediate action can best be dealt with in other fashions, at least at this early stage. For example, the Chief Judge could assign the judge in question to administrative or other non-judicial duties until the investigative body has made its decision as to the filing of charges. Furthermore, since it would only be very serious allegations against judges which might warrant some form of early action, it is likely that the investigative body would quickly be notified of the allegations, through the police, the media or other sources. Therefore, the investigative body would likely take action forthwith, thus reducing the time between the occurrence of the alleged misconduct and the decision as to charges by the Judicial Inquiry Board. As a result, the need for interim suspension during investigation is correspondingly reduced. We recommend:

RECOMMENDATION 57

That there be no provision for suspending a judge while an investigation into his conduct is pending. However, the Chief Judge would remain free to reassign such a judge to administrative duties.

Although we would rule out suspension of a judge during the investigation of a complaint, in our view, provincial judges should be suspended automatically upon the filing of charges by the Judicial Inquiry Board. The filing of charges indicates that an independent investigative body has decided that a sufficient basis exists (and the matter is serious enough) to proceed to an

[71]MAN, s. 30.

inquiry before the Judicial Council. This "screening" process substantially diminishes the risk that a judge will be suspended on groundless charges. Furthermore, the provision for automatic suspension protects the Judicial Inquiry Board and the disciplinary process from charges that a predetermination of guilt takes place (i.e. those judges who are suspended are guilty, but those who are not guilty are not suspended). At the same time, the Judicial Council is not placed in the difficult position of making a preliminary decision on the merits of a case which it will eventually be hearing in full.

There is, however, the problem of the rare case where a judge may be guilty of misconduct justifying some form of sanction (e.g. a reprimand) but has likely not done anything which would warrant the imposition of a suspension. In this situation the Judicial Inquiry Board (not the Judicial Council) should be able to waive the suspension which would otherwise automatically be imposed. Such a waiver will of course be infrequent and reserved for those few cases where the investigative body feels that charges should be laid, but that the matter is not serious enough to warrant suspension. Clearly, in this situation, the Judicial Inquiry Board, having waived the imposition of an interim suspension, would be precluded from seeking the imposition of a suspension as a final disposition of the matter (i.e. they would have to seek some lesser penalty, such as a reprimand, before the Judicial Council). Consequently, the Commission recommends:

RECOMMENDATION 58

That, upon the filing of charges against a judge by the Judicial Inquiry Board, the judge should be automatically suspended unless the Judicial Inquiry Board waives the suspension.

Finally, we consider the issue of salary during interim suspension. Most of the jurisdictions we have surveyed provide for the continuation of salary during the suspension, subject to the discretion of some person or body (e.g. the Chief Judge of the Provincial Court or the Judicial Council) to order that the suspension be without pay. Currently, the Chief Judge of Manitoba's Provincial Court decides whether or not to impose an interim suspension, but the Judicial Council has the discretion to order that the judge not receive any salary during the suspension.[72] Therefore, the present Manitoba legislation apparently contemplates suspension with pay (unless otherwise ordered by another body).

We feel that interim suspension should be with pay. There has not yet been a formal inquiry into the judge's conduct at this point; it would be unfair (and a possible violation of the judge's right to financial security) to provide for cessation of salary merely upon the filing of charges against the judge. However, it is possible that, in a handful of situations, the charges against the judge may be so strong (and serious) that some consideration of suspension of salary is called for. Such consideration should not be by the Judicial Inquiry Board (which, having been responsible for the decision to lay charges against the judge, may be perceived as insufficiently objective to make decisions concerning the judge's salary). Furthermore, if consideration of suspension without pay is to be the responsibility of the Judicial Council, it is essential to provide that the Council member who makes such a decision be precluded from any further participation in the disciplinary proceedings against that judge. Therefore, only one member of the Judicial Council should consider the issue of suspension without pay. Otherwise, the numbers of the Council could be seriously reduced, if several members take part in the

[72]MAN, ss. 30 and 36(2).

decision concerning salary, and are thereby prevented from further participation in the proceedings. Accordingly, the Commission recommends:

RECOMMENDATION 59

That, unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a judge should be with pay.

RECOMMENDATION 60

That the member of the Judicial Council who hears such an application for suspension of a judge without pay be barred from further participation in the matter.

(f) Proceedings in public or in camera

Provisions respecting the holding of Judicial Council hearings in public or in private vary considerably in Canada. Some jurisdictions hold inquiries in private, subject to the proviso (in some cases) that hearings may be public where the Council believes that it is in the public interest or that there are compelling reasons to do so.[73] Other provinces allow the judge in question to choose between a public or private hearing.[74] The Model Act requires hearings to be held in private.[75] In Manitoba, hearings are held in public unless the Judicial Council determines that, in the public interest, all or part of the inquiry should be held in camera.[76]

Several reasons have been suggested in support of private hearings:

- they encourage participation in the process by protecting complainants and witnesses from retribution or harassment;
- they protect the reputation of innocent judges who are wrongfully accused of misconduct;
- they maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct;
- they encourage voluntary retirement by the judge to avoid costly and lengthy formal hearings;
- they protect members of judicial disciplinary commissions from outside pressures.[77]

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[73]ALTA, s. 11(4); NS, s. 13C(2); ONT, s. 59(3); SASK, s. 17(4).

[74]NFLD, s. 20(4); NB, s. 6.10(5).

[75]Committee on Judicial Independence, Canadian Association of Provincial Court Judges, "Model Act (Provincial Court)" (1987, No.4), 11 Prov. Judges J. 21, s. 17.

[76]MAN, s. 32.

[77]*Supra* n. 57, at 760.

The responses to these arguments may be summarized as follows:

- If secrecy encourages participation by complainants and witnesses in the process, surely this strength is diminished by the fact that numerous commissions have authority to disclose the identity of the complainant and any witnesses to the judge during the investigation. Furthermore, every commission allows a judge some measure of discovery power against witnesses (either during the investigative or adjudicative stage) and notice of the nature of the charges or provision of a written complaint to the judge in question is a routine feature of disciplinary proceedings. Therefore, even if the identities of the complainants or witnesses are not actually disclosed, in many cases the judge will find it very easy to guess who they are (and, once the matter becomes public, everyone will know who the witnesses are);

- Although it is justifiable to provide privacy pending investigation of the alleged misconduct, the reasons are less compelling for continuing confidentiality beyond the commencement of formal proceedings, because at that point some kind of probable cause determination has taken place (i.e. the charges have been found to have a sufficient basis to require formal hearing). Therefore, by the point at which formal proceedings are commenced, the risk of unwarranted damage to reputation is substantially diminished;

- There is a need to balance the judicial interest in avoiding undeserved damage to reputation with the strong public interest in obtaining information about possible judicial misconduct;

- The argument that confidentiality bolsters confidence in the judiciary (much publicity about complaints against judges would lead the public to believe that the judiciary is incompetent) is subject to the rebuttal that keeping the public uninformed about such matters is certainly not in the public's best interest, and respect for the judiciary cannot be obtained by suppressing criticism of judges (the public suspects "whitewash");

- The usefulness of confidentiality as a means of persuading judges to voluntarily resign or retire rather than going through the lengthy and costly formal hearing process must be weighed against the potential for abuses such as favouritism and inconsistent application of standards;

- There is no factual support for the implication that members of judicial commissions are in some way more vulnerable to influence or pressure than other government or judicial officials.[78]

We are of the opinion that it is not necessary to require that disciplinary proceedings be held in private. Indeed, the Commission finds the arguments in support of public hearings to be compelling. Once charges are filed against a judge, the proceedings should take place in full view of the public.

The current Manitoba legislation provides that inquiries before the Judicial Council shall be held in public, unless the Council determines that it is in the public interest to hold all or part

[78] *Supra* n. 57, at 760-765.

of the inquiry in private.[79] The Commission concludes that there is no reason to depart from the present provision. We therefore recommend:

RECOMMENDATION 61

That the Judicial Council hold its hearings in public, unless it determines that it is in the public interest that they be held in private.

(g) Disposition of complaints

We have already seen that, in Manitoba, the Judicial Council has no power to remove a judge from office. The Council may dismiss a complaint, reprimand the judge or suspend him or her. If a judge is suspended, the Lieutenant Governor in Council (the Cabinet) may remove the judge from office and revoke his or her appointment (after either an appeal to the Court of Appeal is dismissed or the time for appeal has expired).[80]

In our view, it is inappropriate that the decision on whether or not a judge is to be removed from office be left to the provincial Cabinet. First, it seriously undermines the credibility of the disciplinary process; why set up a new system emphasizing principles of fairness and natural justice when its decisions can be overturned by political considerations? Secondly, a system which leaves the ultimate decision on removal to the Cabinet, a body which need hold no hearings or otherwise listen to the judge's case, must surely contravene the constitutional requirement enunciated by the Supreme Court of Canada that, in order to remove a judge, there must be a process of independent review which affords the judge a full opportunity to be heard.[81]

We believe that the power to remove a provincial judge must be vested either in the provincial Legislature or in the Judicial Council.[82] The most powerful argument for vesting this power in the Legislature is that it is an elected body, accountable to the public for its actions. However, this is countered by several strong arguments to the contrary. First, a requirement for legislative action may politicize the disciplinary process. For example, judges appointed by a previous provincial government could, if faced with removal by the Legislature, find themselves the subject of harsh and possibly unfair scrutiny by the government of the day, simply because they were appointed by a government of another political persuasion. More importantly, the provincial Legislature is a wholly inappropriate forum for the process of independent review and full hearing mandated by the Supreme Court of Canada. The Legislature would have to suspend its ordinary business and convert itself into a quasi-judicial body, a role for which it is poorly suited.

We therefore conclude that the Judicial Council should be empowered to order the removal of provincial judges from office. However, an appeal to the highest court in the province, the Manitoba Court of Appeal, should be provided for.

The present sanctions of reprimand, suspension, removal and costs should be expanded to provide for fines and mandatory leaves of absence. Allowing the imposition of fines would mean that the Judicial Council would not have to resort to a large order of "costs" as a sort of unofficial fine. The leave of absence provision is meant to deal with situations where the judge

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[79]MAN, ss. 32.

[80]MAN, ss. 36(1) and 39.

[81]*Valente v. The Queen* (1985), 24 D.L.R. (4th) 161 (S.C.C.).

[82]The Model Act vests the power in the Judicial Council: *supra* n. 75, s. 14(1). In Ontario, the power to remove is vested in the Legislature: ONT, s. 56.

is suffering from a disability which may be treated, such as alcoholism or "burn-out". In these situations, treatment may be the best response to the judge's neglect or misconduct. Therefore, the Council should be allowed to order the judge to take a leave of absence for specific rehabilitative purposes. The leave of absence should be with or without pay, in the Council's discretion. If the judge in question fails to comply with the rehabilitation conditions (i.e. refuses treatment), the Council would not be precluded from ordering other sanctions against him or her, including removal.

The Judicial Council should continue to be authorized to order costs as it may deem appropriate. However, the current legislation does not stipulate in whose favour the order of costs should be made. In the interests of fairness, the Council should be empowered to order costs either in favour of the Judicial Inquiry Board or in favour of the judge himself or herself. After all, if the judge has been acquitted by the Judicial Council or has only been given a minor punishment, it may appear warranted to the Judicial Council that all or part of the judge's legal costs be compensated. Accordingly, it should be possible to make orders as to costs in favour of either party to the proceedings.[83]

In a few cases, it may be necessary for the Judicial Council to consider whether or not salary which was forfeited by the judge should be remitted. We have already recommended that, in most cases, judges who are suspended following the laying of charges will continue to receive their salaries. Only in rare and serious cases would the Judicial Inquiry Board be able to apply for and receive a preliminary order denying salary to the judge while suspended. In these infrequent situations, the Judicial Council should (after the inquiry is complete) be empowered to order that all or part of the forfeited salary be remitted to the judge. This power is currently provided to the Judicial Council.[84] It should be continued, but only in situations where the Council does not order suspension or removal of the judge on disposition of the case.

We have already indicated that, if a judge's disability is or may be treatable, a leave of absence may be deemed appropriate. However, in situations where the disability is of a permanent nature and is so great as to prevent the judge from effectively carrying out the duties of his or her office, a disposition which is not as harsh as removal for misconduct should be available. That is, the Council should be empowered to order removal for disability which is deemed to be voluntary retirement from office. Thus, the judge would be retired (not removed) and would be eligible for a full pension.

We recommend:

RECOMMENDATION 62

That the Judicial Council be empowered to dispose of matters heard by it in one or more of the following ways:

(a) by dismissing the complaint;

(b) by reprimanding the judge;

(c) by fining the judge;

(d) by suspending the judge for a fixed period of time;

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[83]Obviously, costs ordered against the Judicial Inquiry Board would be borne by the province's Consolidated Fund, not by the members of the Board personally.

[84]MAN, s. 36(3).

(e) by removing the judge;

(f) by ordering costs in favour of or against the judge or the Judicial Inquiry Board;

(g) by requiring the judge to take a leave of absence (with or without pay) for the purpose of obtaining treatment;

(h) where the judge is unable to perform the duties of his or her office by reason of disability, by ordering that the judge be deemed to have voluntarily resigned with full pension;

(i) by ordering that all or part of any salary forfeited by the judge during suspension (prior to the inquiry) be remitted, provided that the Council does not order the judge to be suspended or removed from office.

It is possible that a judge who is the subject of disciplinary procedures will resign or retire from office before those proceedings are complete. In that situation, should the proceedings continue? This is the so-called "moot complaint" issue. In some American jurisdictions, courts or commissions which hear judicial discipline cases have stated that mootness is not a defence. That is, the proceedings may be continued even after the judge retires.[85] There is, however, a reason for continuing those proceedings which is applicable to some American jurisdictions but which is irrelevant to Manitoba. In some states, the body charged with disposing of the complaint is empowered not only to order that the judge in question be removed from office, but also to order that the judge thereafter be ineligible for judicial office (this is important in jurisdictions where persons are elected to the Bench; it is essential to prevent those who have been removed from judicial office from running again and being re-elected).[86] Such concerns are irrelevant to Manitoba. Judges are appointed here, not elected. It is practically impossible that the body charged with appointing judges to our Provincial Court (or recommending candidates for that office) would appoint or recommend someone who was obliged to retire in the face of disciplinary proceedings. Therefore, to continue with the prosecution of charges against persons who have resigned from the Bench would be unnecessary, expensive and time-consuming. Accordingly, the Commission recommends:

RECOMMENDATION 63

That the Judicial Council not hear moot cases. The departure from office of a judge should terminate the jurisdiction of the Judicial Council in the matter.

Finally, we consider the question of appeals. We have already stated that there should be an appeal to the Manitoba Court of Appeal from decisions of the Judicial Council. It should be noted that although the prototypical two-tier system found in the United States is often said to be completely segregated from the ordinary court system (i.e. there is not usually a right of appeal to the highest court in the jurisdiction), the reasons for this segregation are not relevant to Manitoba. The concept of the two-tier system was the result of a court scandal which struck the highest court of the State of Illinois.[87] It was concluded that, in order to be effective, the "second tier" or adjudicative level had to be able to make final disposition of matters, without being subject to judicial review. The reasons for this were that the then-existing Courts Commission

[85] *Supra* n. 24, at 13.

[86] R.S. Buckley, "The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct" in *Judicial Discipline and Removal* (G.R. Winters ed. 1973) 60 at 67.

[87] F. Greenberg, "The Illinois 'Two-tier' Judicial Disciplinary System: Five Years and Counting" (1977), 54 Chi.-Kent L. Rev. 69 at 71.

(the judicial disciplinary body) was controlled by the State Supreme Court, and this created problems when the judges in question were members of the State Supreme Court.[88]

None of the above objections have any application to Manitoba. The Judicial Council is a provincial body which hears complaints against Provincial Court judges, not judges of Manitoba's superior courts. Therefore, even though a right of appeal is provided to the Manitoba Court of Appeal, this could never result in that Court hearing appeals of disciplinary proceedings against Manitoba's superior court judges (those judges are dealt with by the federal judicial disciplinary process).

The requirement for an appeal to the Court of Appeal gives rise to several related issues. Who should be allowed to appeal? What may be appealed (conviction or disposition, or both)? What should the Court of Appeal be authorized to do on an appeal?

The Commission has concluded that both the judge and the Judicial Inquiry Board should be allowed to appeal a decision of the Judicial Council. In view of the sweeping new powers of disposition which we have recommended for the Judicial Council, it is only appropriate that both of the parties affected by the decisions of the Council have full rights of appeal against them.

For the same reason, we are of the opinion that the basis of appeals should not be restricted. The broad powers which we feel should be conferred upon the Judicial Council serve further to judicialize the disciplinary process; to complement the increased significance of the Council's decision-making powers, there should be a widely-based right of appeal. Therefore, appeals should be available in respect of either the Council's determination of guilt or innocence or the penalty imposed or both. We do, however, recognize that, as with other appeals heard by it, the Court of Appeal will generally be loath to substitute its discretion for that of the Judicial Council.

We recommend:

RECOMMENDATION 64

That both the judge and the Judicial Inquiry Board be permitted to appeal a decision of the Judicial Council (as to guilt or penalty or both) to the Manitoba Court of Appeal.

4. Grounds For Disciplinary Action or Sanctions

To this point, we have been concerned with the method by which complaints against provincial judges should be made and determined. We now consider the grounds upon which those complaints may be made.

The grounds of misconduct which allow persons to make complaints against provincial or territorial judges do not vary widely from one Canadian jurisdiction to another. In general, the usual grounds for complaints include:

- lack of competence
- misconduct or misbehaviour
- neglect of duty
- inability to perform duties
- conduct that is incompatible with the execution of the judge's office

[88] *Id.* at 70-71.

Québec is the only Canadian jurisdiction which has attempted to enunciate more specific guidelines. Its Judicial Council ("Conseil de la magistrature") is charged with the responsibility of developing a judicial code of ethics.[89] The Conseil receives and examines complaints which allege that a judge has failed to comply with the Code of Ethics.[90] However, the Code of Ethics which it has developed is quite general in nature, referring only to obligations such as: "The judge should perform the duties of his office with integrity and honour", or "The judge should be, and be seen to be, impartial and objective".[91]

While Québec's Judicial Code of Ethics may be hampered by the generality of its provisions (the Code is only one page long), it is important to note that the use of Judicial Codes (similar to the Code of Professional Conduct adopted by Manitoba's legal profession) has enjoyed considerable support in the United States.

The American Bar Association Model Code of Judicial Conduct was approved in 1972, and since then 47 states and the District of Columbia have adopted it in one form or another.[92] The Code of Judicial Conduct is made up of seven canons, each of which sets out a broad principle:

1. A judge should uphold th[illegible]ty and independence of the judiciary.
2. A judge should avoid impropriety and the appearance of impropriety in all his activities.
3. A judge should perform the duties of his office impartially and diligently.
4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.
5. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.
6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.
7. A judge should refrain from political activity inappropriate to his judicial office.[93]

Most of these canons are further broken down into more specific sub-rules and are accompanied by commentary. For example, Canon 2 (dealing with impropriety or the appearance of impropriety) is divided into two sub-rules, one of which provides:

> A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.[94]

The commentary then goes on to discuss, among other things, the inappropriateness of membership "in any organization that practices invidious discrimination on the basis of race, sex,

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[89]PQ, s. 256(b).

[90]PQ, s. 263.

[91]Québec Order-in-Council, O.C. 643-82, March 17, 1982, *Judicial Code of Ethics*, ss. 2 and 5.

[92]*Supra* n. 24, at 9.

[93]American Bar Association, *Code of Judicial Conduct* (Supp. 1984).

[94]*Id.*, Canon 2B.

religion or national origin" and attempts to provide guidelines as to when an organization can be said to be practising such discrimination.

It is important to note that the ABA Code does not merely cover the conduct of judges while on the Bench; it also governs their conduct off the Bench. In California, conduct prejudicial to the administration of justice which brings the judicial office into disrepute is a ground for disciplinary action. It is this ground which provides the basis for judicial discipline for non-official conduct. Twenty-eight states have constitutional provisions similar to California's and 20 states authorize judicial discipline for violation of the state's Code of Judicial Conduct. These grounds potentially include conduct that is not official.[95] Off-the-Bench conduct which has resulted in disciplinary procedures (and, in some cases, removal from office) includes the abuse of the judicial position by activities such as ticket fixing, attempting to obtain special treatment for one's self because one is a judge, using the power of contempt for intimidation purposes and conducting one's self in a violent manner in public.[96] Similarly, personal improprieties (such as those involving the sexual activities of the judge) have been held to be grounds for judicial discipline, particularly where the liaison could lead to the impression that the judicial office had been compromised.[97]

The difficulties caused by the absence of a clearly enunciated Code of Judicial Conduct in Canada were highlighted in the case involving Thomas Berger, then a judge of the British Columbia Supreme Court. In November 1981, at the height of the debate over the patriation and amendment of the Canadian Constitution, Mr. Justice Berger publicly criticized two features of the Constitutional Accord which had just been reached between Prime Minister Trudeau and the Premiers of nine provinces. These features were the failure to guarantee native rights and the denial to Québec of a veto over constitutional change. The criticisms were contained in a speech delivered to the University of Guelph Convocation on November 10th and repeated in an article written for the *Globe and Mail* and published on November 18th, 1981.[98] Mr. Justice Addy of the Federal Court of Canada wrote two letters to the late Chief Justice Laskin (then Chairman of the Canadian Judicial Council) complaining that Mr. Justice Berger was guilty of conduct inconsistent with his judicial office.[99] In fact, Mr. Justice Addy alleged that Berger was guilty of misconduct which "would tend to cause far greater harm to the administration of justice than sleeping with a prostitute or driving while impaired".[100]

On March 8, 1982, the Canadian Judicial Council appointed a special committee to inquire into the charges. Mr. Justice Berger refused to participate in this committee's proceedings, arguing that, because the facts were not in dispute, there was no need for investigation, and that in any case the Judicial Council had no authority to rule on a judge's conduct unless that conduct constituted grounds for removal from office.[101] The committee delivered a unanimous report, concluding that, although Mr. Justice Berger's conduct ". . . would support a recommendation for removal from office . . .", such a severe sanction should not be invoked in this case because it would be unfair to remove a judge on the basis of standards of judicial restraint which had not previously been enunciated.[102] The Canadian Judicial Council considered this report and passed

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[95]Martineau, *supra* n. 1, at 229.

[96]*Supra* n. 24, at 12.

[97]*Supra* n. 24, at 13.

[98]J. Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984), 29 McGill L.J. 369 at 371.

[99]*Ibid.*

[100]*Supra* n. 32, at 85.

[101]*Supra* n. 98, at 371-372.

[102]*Supra* n. 98, at 372.

a resolution declaring that, although Mr. Justice Berger had committed an indiscretion by expressing his views on matters of a political nature when such matters were in controversy, his action did not constitute any basis for recommendation that he be removed from office.[103] The Judicial Council also expressed the opinion that members of the judiciary should avoid taking part in controversial political discussion except only in respect of matters that directly affect the operations of the courts.[104]

It is interesting to note the comment of the special committee in the Berger case that, although the judge's conduct in that case would justify his removal from the Bench, it would be unfair to remove a judge on the basis of standards of judicial restraint which had not previously been enunciated.[105] A similar theme can be found in the decision of Manitoba's Judicial Council in a recent case on the propriety of the conduct of a provincial judge in making comments to the press and in releasing to the media the transcript of his interview with police officers. The interview concerned allegations of ticket-fixing which had been raised with respect to the judge. The majority opinion specifically indicated that it was taking into account ". . . the lack of specific guidelines for the members of the Provincial Judiciary with respect to matters of this kind. . . ."[106] It is also interesting to note that the Judicial Council itself could not achieve unanimity on the question of whether this conduct was in fact improper.

We, too, are concerned with the need to provide guidelines to judges which clearly set out what conduct is acceptable and what conduct will result in disciplinary action. Currently, our legislation provides only that complaints may be made against a judge with respect to conduct unbecoming a judge, or neglect of duty by a judge, or the ability or capacity of a judge to perform his duties.[107] We have considered whether the grounds for making a complaint should be expanded, should be made more specific, or should incorporate by reference a Code of Judicial Conduct which is based on the ABA Code or the Québec Code (or some combination). In the end, we have decided that attempting to delineate *by legislation* exactly what is or is not judicial misconduct is ultimately an attempt to define the indefinable. Provisions respecting misconduct must, by their nature, be general; to attempt to legislate more specific grounds for disciplinary sanction could result in arguments being raised that, by not specifically including a certain act or type of behaviour as punishable, the Legislature must have intended that this conduct or behaviour be considered acceptable ("if it's not strictly forbidden, it's permitted"). This would lead to greater uncertainty and arbitrariness (not to mention litigation) than is presently the case.

Consequently, we feel that the provisions *in the legislation* concerning the grounds for disciplinary action can only be worded generally. The current grounds are in line with most other Canadian jurisdictions; they are as useful as most jurisdictions' grounds for disciplinary action. However, efforts should be made to achieve greater certainty outside of the legislation. Guidelines are needed which provide our provincial judiciary with a reasonably clear standard of conduct. The Commission feels that such guidance can best be brought out through the

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[103]*Supra* n. 98, at 372.

[104]W.A. Esson, "The Judiciary and Freedom of Expression" (1985), 23 U.W.O.L. Rev. 159 at 163. The issue of judicial freedom of speech is again being hotly debated in Canadian legal circles. The focus for this debate is an unprecedented case currently before Québec's Superior Court. Québec Court judge Andree Ruffo of the Youth Division, who is an outspoken advocate of the rights of children, is suing the Chief Judge of the Court of Québec, Albert Gobeil, because he issued a gag order on March 21, 1989, demanding that Judge Ruffo refrain from participation and public commentary concerning the Youth Division of the Québec Court and the practices of judges who are assigned there. Judge Ruffo is also under investigation by the Conseil de la magistrature, and has been suspended with pay since July, 1988: André Picard, "Québec court to hear lawsuit centring on rights of judges", *The Globe and Mail*, May 15, 1989, A1 and A5.

[105]*Supra* n. 98, at 372.

[106]*Re Allen* (Judicial Council of Manitoba, February 14, 1989, unreported) at 15.

[107]MAN, s. 28(1).

development of a Code of Conduct. While the drafting of such a Code is beyond the scope of this project, we believe that the body charged with administering disciplinary sanctions, the Judicial Council, should be authorized to develop a Code. Breach of this Code would be grounds for disciplinary sanctions. The Council could secure representations from the provincial judiciary (including those members who sit on the Council) in order to develop a set of ethical guidelines uniquely suited to our Provincial Court. Such a Code of Conduct would provide our judiciary with a clearer idea of what is judicial misconduct and would form the basis for a body of jurisprudence to guide future Judicial Councils. We recommend:

RECOMMENDATION 65

That The Provincial Court Act continue to use the grounds for discipline presently set out therein (conduct unbecoming a judge or the neglect of duty by a judge or the ability or capacity of a judge to perform his duties).

RECOMMENDATION 66

That the Judicial Council accord high priority to the development of a Judicial Code of Conduct, breach of which would be grounds for disciplinary action.

5. Role of the Attorney General

The current Manitoba legislation confers special treatment on our Attorney General. There are two basic areas where the Attorney General is treated differently from other complainants. First, the Attorney General can require the Chief Judge of the Provincial Court to investigate a provincial judge, magistrate or justice of the peace, and is entitled to a report of this investigation.[108] Secondly, the Attorney General can require the Judicial Council to hold an inquiry into the conduct, ability or capacity or neglect of duty by a judge and is entitled to appoint counsel to appear on his behalf and present evidence at the inquiry and to receive a record of the proceedings of the inquiry.[109]

These provisions are inconsistent with our proposed disciplinary process. They subvert both the screening role to be played by the Chief Judge and the investigative and prosecutorial role to be played by the Judicial Inquiry Board. Obviously, the Attorney General of the province has a vital interest in the proper administration of justice in Manitoba. He or she should be free to lodge complaints against a provincial judge. However, such complaints should be made in the normal way (to the Chief Judge or to the Judicial Inquiry Board) and should receive the same serious consideration accorded to all complaints.

Similarly, we do not agree with the current provision which grants the Attorney General an automatic privilege of standing at inquiries which the Attorney General has requested the Judicial Council to hold. No single body or person should be entitled, as of right, to appear at Council inquiries, save for the judge in question and the Judicial Inquiry Board. We have already recommended that the Judicial Inquiry Board be empowered to retain legal counsel; such counsel should completely fulfil any and all prosecutorial duties at the inquiry. We recommend:

RECOMMENDATION 67

That the Attorney General should no longer be treated differently from other complainants. Complaints by the Attorney General should be made and dealt with in the same manner as those of any other complainant.

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[108]MAN, ss. 8(3) and (4).

[109]MAN, ss. 31(1), 33(1) and 36(1).

D. CONCLUSION

The current disciplinary process for Manitoba's Provincial Court judges is marred by several major flaws. The system does not adequately separate the investigative and adjudicative aspects of the disciplinary process. It fails to provide for an autonomous, multi-disciplinary investigation of complaints against judges. It does not provide adequate guidelines to the judiciary as to what is and is not judicial misconduct. It confers too many rights and too much discretion (including the discretion to order removal of a judge from office) on the Executive.

We believe that the current disciplinary process should be replaced. The new disciplinary procedure which we propose will bring Manitoba significantly closer to the ultimate objective of judicial discipline: the achievement and maintenance of public confidence in the judiciary while safeguarding the independence of the judges from arbitrary interference.

CHAPTER 6

EVALUATION

A. INTRODUCTION

Manitoba's Provincial Court judges hold office virtually for life. There is no mandatory retirement age, and the judicial disciplinary process has never resulted in an order for the removal of a judge of the Provincial Court. Therefore, it is not likely that provincial judges will have their security of tenure terminated by any event other than the judges' voluntary retirement. This security of tenure is vital for the independence of the judiciary, but it also raises an important question. What can be done to ensure the maintenance of a high quality of performance of individuals who are guaranteed job security for as long as they wish to work? The judicial disciplinary process is designed to respond to serious abuses of the powers of the office; however, there may from time to time be less harmful, yet still significant, problems in judicial performance or attitudes which do not merit the invocation of a lengthy, disruptive and expensive disciplinary process. A means of improving performance without infringing on independence should be found for the judges of the Provincial Court.

While we have not discovered any current, on-going judicial evaluation programs in Canada,[1] judicial evaluation programs do exist in the United States; these programs were designed to achieve several important objectives:

- to enhance the judicial system through the improvement of the performance of judges on an individual and institutional basis;

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[1]Some *ad hoc* programs do exist. Ontario's Law Union recently announced a project to develop a Guide to Ontario Judges' Performances and Biases, designed to help lawyers judge the judges and tailor their courtroom strategies and conduct accordingly. The principal goal of this manual (which has not yet been published) is to help lawyers in their dealings with judges, but a secondary objective is to "start the process for more public and intelligent commentary on the performance of the judiciary.": C. Schmitz, "Ontario Law Union Will Rate Judges on Performance, Biases", *The Lawyers Weekly*, June 10, 1986, 1; M.G. Crawford, "Judging Judges", *Canadian Lawyer*, May 1989, 18 at 19.

This year *Canadian Lawyer* magazine carried out a national survey of lawyers to determine the best and worst judges in each province: "The Best & Worst", *Canadian Lawyer*, May 1989, 20. The results of this survey were recently published, despite the objections (largely on grounds of methodology) of at least five provincial law societies, including the Law Society of Manitoba: Law Society of Manitoba, *Communique*, April 1989, 6. However, public reception to the survey has been somewhat warmer. As one editorialist stated: "The law . . . has a real and visible impact on Canadians. They should be free in turn to peer at its workings and make their feelings known": "When Lawyers Rate the Judges", *The Globe and Mail*, May 10, 1989, A6.

In Manitoba, the John Howard Society has been involved in a court monitoring program in the Provincial Court since 1981. Volunteers attend the daily sessions of the docket court and record factual information on data collection sheets concerning accused persons who are applying for bail or pleading guilty to their charges. The data collection sheets provide spaces for the monitors' comments, although these comments are usually related to the offenders themselves, not to the judges who preside over the cases. The court monitors record their observations and impressions of various aspects of the court process, including legal representation of the accused, judicial interim release, domestic abuse cases and the treatment of individuals who are before the court (this has included observations as to the behaviour of judges towards accused persons). The purposes of the program are to educate the Society's volunteers about the court process, as well as to gather information on accused persons (including the Society's own clients) who appear before the court for something more substantive than a remand. Although the observations of the monitors are not to be construed as the results of a detailed evaluation, it is important to note that they have expressed concern about the functioning of the Court in general and about the attitudes of the judiciary towards accused persons in particular: John Howard Society of Manitoba, "Report: Provincial Court Monitoring Group" (1985, No. 4), 9 Crown Counsel's Review 17; telephone interview with Kim Kornichuk, Coordinator, Court Monitoring Program, John Howard Society of Manitoba, April 24, 1989.

- to identify judicial education needs, and thereby improve the design and content of continuing judicial education programs; and

- to enhance the effective assignment and use of judges within the judiciary.[2]

The Commission is of the view that the objectives listed above, together with the equally important goals of improving both public confidence in the judiciary and the judges' job satisfaction, justify the implementation of a performance evaluation program for the judges of Manitoba's Provincial Court. This program must be carefully structured so as not to infringe on judicial independence or on the prerogatives of an individual judge in deciding cases and discharging judicial responsibilities.[3] The primary purpose of this evaluation program is the continuing improvement of the provincial judicial system through the impartial assessment of judicial performance and communication of that assessment to the judges of the court. We therefore recommend:

RECOMMENDATION 68

That a judicial evaluation program be established for the judges of the Provincial Court of Manitoba.

There is an additional consideration which is relevant to the issue of a judicial evaluation program. Admirable as the objectives of such a program may be, no on-going system of judicial evaluation can be implemented without consideration of the financial consequences of that implementation. The question of the program's cost is of the utmost importance to the decision to recommend such a program.

The Commission notes that most of the costs associated with this program will be start-up or "capital costs", such as designing the evaluation instrument and preparing a computer program capable of storing and projecting the data generated by the evaluation. While an accurate estimate of costs is beyond the scope of this project, it is felt that the implementation of judicial evaluation on an experimental basis will provide a true picture of the future costs of the program, without the necessity of a large initial commitment of resources. We therefore recommend:

RECOMMENDATION 69

That the evaluation program initially be undertaken as a pilot program, concentrating on recently appointed judges.

As noted earlier, our research did not indicate the use of on-going judicial evaluation programs in other Canadian jurisdictions at this time. In the United States, however, there are continuing judicial evaluation programs in Connecticut, New Jersey, Vermont and Alaska. Pilot projects are also underway in several other states, including Colorado, Delaware, Illinois, Utah and Washington.[4]

There is no doubt that the most comprehensive on-going judicial evaluation program in the United States is that employed by the State of New Jersey. This program has been referred to as

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[2]New Jersey Supreme Court Committee on Judicial Performance, *Report: Assessment of the Judicial Evaluation Project and Proposal for the Permanent Judicial Performance Program* (1985); American Bar Association, Special Committee on Evaluation of Judicial Performance, *Guidelines for the Evaluation of Judicial Performance* (1985); Rules of the Supreme Court of New Jersey, Rule 1:35A-2.

[3]Rules of the Supreme Court of New Jersey, Rule 1:35A-2.

[4]M.J. Sponzo, "Independence vs. Accountability: Connecticut's Judicial Evaluation Program Has Independence and Accountability on the Same Side" (Spring, 1987), 26 Judges' J. 13 at 16.

a "model" for other programs, including the American Bar Association's *Guidelines for the Evaluation of Judicial Performance.*[5]

A judicial performance program has been on-going in New Jersey (initially on an experimental basis) since July 1983.[6] The pilot project commenced as of this date, and was concluded on August 15, 1984. The pilot project focused upon the performance of sitting trial judges. It used questionnaires to elicit information relative to the performance of these judges. In the first phase of the project, the questionnaires were limited to major trial-type proceedings. In the second phase of the project, a questionnaire was developed to encompass judicial performance in other kinds of proceedings, in addition to trial-type activities. Comments and views of both judges and lawyers were elicited prior to the use of the questionnaires in the pilot program. In addition, after each phase of the pilot program, comments of the judges evaluated with respect to the questionnaire were solicited, and final revisions were made.[7]

The Report of the Supreme Court Committee on Judicial Performance, submitted in December 1985, recommended the implementation of the Judicial Performance Program on a permanent basis.[8] The New Jersey Supreme Court approved a Judicial Performance Program and its implementation on a permanent basis in accordance with this recommendation. The program began on January 1, 1987.[9] Reference will be made to the New Jersey Program throughout the course of this Chapter.

B. ISSUES AND RECOMMENDATIONS

1. Introduction

Any method of judicial evaluation to be employed must be capable of satisfying the questions and criticisms which have been raised with respect to several major issues. However, paramount in our consideration of these issues is the concern that judicial independence and impartiality be in no way compromised through the use of judicial evaluation. In this section, we will examine various approaches to each of the issues listed below, using New Jersey's on-going judicial evaluation program for comparative purposes. In the analysis of these issues, we choose alternatives which we believe should substantially answer the questions and criticisms of the evaluation process while, at the same time, entrenching the fundamental value of protection of the integrity of the provincial Bench.

The issues which we shall examine are:

- Who should be responsible for judicial evaluation?
- Who should actually carry out the evaluation (i.e. determine the methods, select the criteria, distribute the necessary materials, and analyze the data)?
- From what sources should the information be gathered?
- How should the information be collected?

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[5]Press Release, Administrative Office of the Courts (State of New Jersey: November 13, 1986) 1.

[6]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 3.

[7]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 8.

[8]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 53.

[9]*Supra* n. 5, at 1.

- How frequently should information be collected?
- What use should be made of the data collected?

2. Who Should Be Responsible for Judicial Evaluation?

In the jurisdictions (usually American) which have, in the past, carried out some form of judicial evaluation, the sponsors of such programs have included courts or some court-established institution, Bar Associations, non-judicial branches of government, or some combination of these groups.[10]

Obviously, the sponsoring group for evaluation must be one which has the credibility and "clout" to secure the judges' cooperation, and one which possesses adequate financial and personnel resources to establish and maintain the program.

In New Jersey, the State Supreme Court established, by Court Rule, a Judicial Performance Program.[11] The program is maintained by two committees. These committees are the Judicial Performance Committee and the Judicial Evaluation Commission.[12]

The Judicial Performance Committee is appointed by the State Supreme Court and is composed of judges from all levels of the State court system, members of the Bar and lay persons. All terms of appointment are for two years, and members may be re-appointed.[13] The Judicial Performance Committee does not participate in the actual evaluations. It has responsibility for the overall administration and supervision of the program, and also acts as an advisory body to the State Supreme Court. It is for this reason that the lay person membership of the Committee includes people from private enterprise who have expertise in management.[14]

The Committee exercises a supervisory and planning role with respect to the evaluation program. It is not responsible for the day-to-day work of the program, i.e. the sending out of questionnaires, the tracking of responses, the analysis of data, and the release of data to the judge in question. These tasks are performed by staff within the office of the State Court Administrator (this will be discussed later).

The Judicial Evaluation Commission is composed of at least three retired judges, appointed by the New Jersey Supreme Court for terms of two years, with possibility of re-appointment.[15] The Judicial Evaluation Commission was created, at the judges' request, to provide independent evaluations of judges in particular cases. That is, the Commission performs a reviewing role, if the judge in question feels that the original evaluation (as prepared by the staff of the State Court Administrator) was unfair. It may also be asked to conduct evaluations in particular cases. The Commission will review evaluation information, provide consultation and assistance to individual judges, and assist in the development of educational and performance improvement

[10]R.L. Aynes, "Evaluation of Judicial Performance: A Tool for Self-Improvement" (1981), 8 Pepperdine L. Rev. 255 at 293.

[11]Rules of the Supreme Court of New Jersey, Rule 1:35A-2.

[12]Rules of the Supreme Court of New Jersey, Rule 1:35A.

[13]Rules of the Supreme Court of New Jersey, Rule 1:35A-1.

[14]"Statement of the Supreme Court in Response to the Report of the Supreme Court Committee on Judicial Performance", *supra* n. 5, at 4-5; interview with Justice A.B. Handler, Judge of New Jersey Supreme Court, October 7, 1988.

[15]Rules of the Supreme Court of New Jersey, Rule 1:35A-4.

programs in conjunction with the State Judicial College.[16] The Judicial Evaluation Commission may in future be asked to serve a broader role as the body responsible for administering the judicial performance program. This will give it an executive or management role in addition to its current reviewing and evaluating role.[17]

New Jersey's approach of authorizing lay persons to take part in the evaluation process is of particular significance. It has been stated that, since the improvement of judicial performance is a matter of public interest and importance, representatives of the public should serve on the oversight (i.e. administrative) committee. The participation of non-lawyers in bodies such as disciplinary committees, judicial selection processes, retention decisions, and in the development and implementation of judicial performance evaluation projects has enjoyed considerable success.[18]

The Commission agrees that lay persons should participate in the development and implementation of the evaluation program. The New Jersey approach of authorizing a multi-disciplinary panel or committee to oversee the institution and function of their evaluation project commends itself to us. However, it is not appropriate to vest the appointment power for the composition of this committee in the highest court of the province. As the cost of the program, and the particular circumstances in which the Provincial Court operates are essential factors to be considered by the committee, the government and the judiciary should have a say in determining the membership of the steering committee. Furthermore, it is not at all clear that the program should (as in New Jersey) be promulgated by Court Rule. In Manitoba, the only Rules pertaining to the Provincial Court are the Provincial Court (Family Division) Rules, and these were created by regulation, not by any separate compilation of "Rules".[19] We believe that the Judicial Evaluation Program should be established by subordinate legislation. Any further guidelines (such as those which the governing committee may wish to establish for the program's functioning) may also be implemented in this manner. The Commission recommends:

RECOMMENDATION 70

That the judicial evaluation program be developed and supervised by a body, to be called the Judicial Performance Committee, composed of:

(a) two persons named by the provincial judges; and

(b) three persons named by the Lieutenant Governor in Council.

RECOMMENDATION 71

That at least two of the members of the Judicial Performance Committee appointed by the Lieutenant Governor in Council should not be lawyers, judges or retired judges.

RECOMMENDATION 72

That the program be established by regulation under The Provincial Court Act.

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[16]Rules of the Supreme Court of New Jersey, Rule 1:35A-4; interview with Justice A.B. Handler, *supra* n. 14; New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 48-49.

[17]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 49.

[18]American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 6-7; *supra* n. 10, at 295-297; J. Sterling, E.K. Stott, Jr. and S. Weller, "What Judges Think of Performance Evaluation: A Report on the Colorado Survey" (1981), 64 Judicature 414 at 422.

[19]A Regulation Under *The Provincial Court Act*, *Provincial Court (Family Division) Rules*, Man. Reg. 87/88R.

The use of a further "go-between" body (such as New Jersey's Judicial Evaluation Commission) provides a useful reviewing function. However, such a body is inappropriate for Manitoba when one takes into account the size of the provincial judiciary and the number of judges likely to be evaluated at one time. Nevertheless, there is a need for an impartial "reviewer"; this issue will be explored in more detail later in this Chapter.

3. Who Should Actually Carry Out the Evaluation?

The prevailing view is that effective judicial evaluation requires a high order of skills, expertise and sophistication.[20] Therefore, persons with knowledge of evaluation techniques should be retained by the Judicial Performance Committee to assist in the development and implementation of the program.

Guidelines for evaluation programs have stipulated that there should be adequate staff and public funding to support the program. This means that the day-to-day work of collecting and distributing instructions and forms and collating data should be delegated to staff members, preferably of a court administrator's or clerk's office. This is the approach adopted by New Jersey, where the Judicial Performance Program (although supervised by the Committee on Judicial Performance) is administered by staff within the office of the State Court Administrator.[21]

These staff members have the responsibility for distributing questionnaires, tracking them, conducting follow-ups, and analyzing data. Evaluation is usually done on a per-case basis; that is, after a case has been concluded, the questionnaires are sent out. Before the questionnaire is mailed, the staff member notes the judge being evaluated, the mailing date, and the name of the respondent. A follow-up letter is sent to the respondent if no answer has been received within 30 days of the mailing date of the questionnaire. When a questionnaire is returned, it is checked by the staff for completeness and coded for both judge and respondent, to preserve anonymity. The information is entered on a computer, and the data is analyzed. The staff members include persons with knowledge of survey design and response, computer programmers and the researchers who track and check questionnaires.[22]

The administration of the program by a multi-disciplinary Judicial Performance Committee (as recommended earlier) will help to incorporate different perspectives (including those of lay persons) into the evaluation system. This participation can (and should) extend to such matters as identification of potential respondent groups and design of the evaluation instrument.

However, certain matters of a more routine (but no less significant) nature should not have to be performed by the Committee. One person, trained in computer use and data analysis, should be able to distribute the necessary forms and instructions, keep track of the responses, run preliminary checks on the data and assemble results for dissemination. Ideally, this person should be a member of the Provincial Court staff. However, certain security measures, such as computer passwords, limited access, and physical security of the premises where data is collected, stored and analyzed are essential for the maintenance of confidentiality by the staff.

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[20] *Supra* n. 10, at 294; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 4-5, 24.

[21] American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 7; *supra* n. 5, at 2.

[22] New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 37-44.

The Commission recommends:

RECOMMENDATION 73

That the day-to-day work of collecting and distributing instructions and forms and collating data be performed by a member of the court staff.

RECOMMENDATION 74

That appropriate security measures be employed to ensure the confidentiality of data collected in the course of the evaluation program.

4. From What Sources Should the Information Be Gathered?

There are two major categories of sources: objective and subjective. Objective sources include public records, such as dockets, trial lists, transcripts and other records which may establish how many hours a day a judge hears cases, how many cases are heard, what comments are made by the judge during the hearing, how many decisions are rendered, and so forth. This information can also provide names of counsel who recently appeared or have frequently appeared before the judge being evaluated.[23] However, these "objective sources" of information are subject to the criticism that the information thus gathered can be misleading (this will be explored, in detail, in the following section).

Objective information is by itself not enough to allow for adequate evaluation. There must be subjective information, i.e. human evaluation. In the past, several groups have been looked to for the provision of detailed, first-hand information or observations with respect to judicial performance. These groups includelawyers, the judges themselves (i.e. self-evaluation), peer review (i.e. judges other than the judge being reviewed), lay persons who may have contact with the judge, such as witnesses or courtroom spectators, law enforcement personnel, media representatives and courtroom watchers such as trained social scientists or citizen groups with an active interest in the process of the judiciary.[24]

It is essential that subjective information come from persons who have had a first-hand opportunity to observe the judge in question. The chief source of information has traditionally been lawyers. It has been stated that:

> . . . those attributes which collectively serve to outline the profile of a "good" judge are ones which lawyers, as opposed to other groups or individuals, can both perceive accurately and evaluate meaningfully.[25]

In New Jersey, the sources of information fall into three categories:

- Appellate Court judges;
- lawyers who have participated in a case which has recently concluded before a particular judge;

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[23]*Supra* n. 10, at 303; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 26.

[24]*Supra* n. 10, at 300-301; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 26-28; New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 35-36; J.H. Guterman and E.E. Meidinger, *In the Opinion of the Bar: A National Survey of Bar Polling Practices* (1977) 53-54.

[25]Guterman and Meidinger, *id.*, at 10.

- lawyers who have regularly appeared before a particular judge in a high volume court (i.e. Motions Court, or a docket court). These lawyers are asked to evaluate the judge's performance over a two-month period.[26]

The Judicial Performance Committee whose establishment we propose may wish to consider the use of designated courtroom observers as a source of first-hand information for the evaluation program. After all, the legal community in Manitoba is relatively small, and some reluctance may be encountered from lawyers who regularly appear before Provincial Court judges (these lawyers, even if assured of confidentiality, may not wish to take part in the evaluation program). It may then be appropriate to consider the use of observers who are present in court but do not appear before the judge or judges in question as a source of information. These persons could be social scientists, or members of groups who have an interest in the activities of the judiciary. For example, the members of the public who take part in the John Howard Society's Court Monitoring Program could be called upon to provide a lay person's perspective on the attitudes and behaviour of the provincial judiciary.

We recommend:

RECOMMENDATION 75

That the program consist of a survey of lawyers who have appeared before the judge being evaluated over a specified period of time and non-lawyers who, in the opinion of the Judicial Performance Committee, regularly attend sittings of the Provincial Court and can meaningfully evaluate the performance of the judge in question.

5. How Should the Information Be Collected?

We have already noted that objective information can be gathered by checking dockets, trial lists and other public records. However, it should not be assumed that this "objective" information is absolutely accurate or capable of acceptance at face value.

There are several problems associated with the use of "objective" information:

- The lawyers whose names appear on the docket may not be those who had primary responsibility for the case or who appeared for the parties at the disposition of matters. Inquiries are needed to establish that the lawyer whose name appears on the docket was, in fact, the one who did most of the work;

- While transcript review by knowledgeable persons (such as retired judges) may provide a source of information for evaluation, it should be noted that the transcripts do not record everything that happens in the courtroom (the tone and inflection of the judge's comments are not recorded, nor is the non-verbal conduct of the judge, nor are remarks made by the judge to counsel in Chambers, i.e. "off the record");

[26] *See* the New Jersey questionnaire forms in Appendix "A".

> A lawyer whose name shows up frequently on the docket under "appearances" may not have actually spent very much time in court (i.e. he or she could have been appearing on simple matters such as remands, which take a minute or less, and are often dealt with before court actually begins).[27]

It is necessary to adopt an approach to the collecting of objective information which deals with the problems listed above. However, it is the collecting of subjective information which causes most of the criticisms of the evaluation process. The most frequently used method (and the method endorsed by the Commission) is the survey of lawyers. The use of lawyers' surveys, of itself, gives rise to a long list of issues and criticisms which we will now examine in turn.

(a) Selection of respondents

There are two important elements in the question of who is eligible to participate: inclusion and exclusion.

Inclusion means that the eligibility criteria ensure that everyone who can make a knowledgeable rating of judicial performance has an opportunity to do so through the evaluation program (therefore, the eligible respondents would include lay persons as well as lawyers). Exclusion means that the criteria (and the method used to implement the criteria) will screen out all but those persons who are able to make knowledgeable ratings of the judges in question.[28]

The minimum requirement of eligibility is *recent personal observation* of judicial performance. Otherwise, the evaluations will be based on hearsay, or merely be a popularity contest.[29] We have already recommended that the lawyers to be surveyed are those who have appeared before the judge over a specified period of time. The "appearances" of the lawyer-respondents must be meaningful; they cannot be for simple or routine matters which require little time or consideration. Specific questions should be asked of the respondents in order to establish eligibility. This will assist in dealing with the problem of respondents who have no actual first-hand knowledge of the judge or judges they are evaluating.

It has been said that self-selection (the lawyer-respondent himself or herself decides whether he or she is eligible to participate in the poll) leads to unrepresentative samples or responses from the legal profession. That is, those groups who have some special interest in evaluating the judge will take part in the survey while other, disinterested lawyers (or other respondents) will simply not participate. The poll thus becomes unrepresentative, and provides biased results.[30]

Another major problem associated with surveys is the response rate. It has been noted that, in Bar Association polls generally, there has been no attempt to determine whether the respondents had personal knowledge of the judge or judges they were evaluating. Therefore, it is impossible to determine whether a significant proportion of knowledgeable respondents actually replied to the survey. A response rate of 30% (i.e. 30% of the questionnaires which were sent out are actually returned) could be a very good response rate, if all the questionnaires were

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[27]*Supra* n. 10, at 302-303; D.L. Maddi, *Judicial Performance Polls* (1977) 6; New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 35-36.

[28]Maddi, *id.*, at 5; C.O. Philip, *How Bar Associations Evaluate Sitting Judges* (1976) 53-54.

[29]Maddi, *supra* n. 27, at 5; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 28. *Note* the criticisms of the Law Society of Manitoba: Law Society of Manitoba, *supra* n. 1, at 6.

[30]C.T. Koebel, "The Problem of Bias in Judicial Evaluation Surveys" (1983), 67 Judicature 224 at 228-229.

completed by knowledgeable persons, and all (or most) of the knowledgeable respondents actually replied.[31]

The use of self-selection, when combined with a low response rate, gives rise to the problem of "systematic bias". That is, the results obtained are not representative of the lawyers (or other persons) being surveyed, and are therefore biased. To guard against this, it is essential to obtain a high response rate.[32]

As noted earlier, the New Jersey program sends questionnaires to Appellate Court judges, lawyers who have recently concluded a case before a certain judge, and lawyers who regularly appear before judges who sit in high volume courts, such as docket courts. The program uses a per-case basis (all counsel who participated in a recent case before the judge are surveyed) in order to identify anomalous, biased or erratic responses. For instance, if all the counsel who appeared in a recent case rated the judge involved very highly, except for one counsel who coincidentally was on the losing side, the per-case approach will point this out. The approach obtains more than one response per case, but no lawyer will ever be asked to evaluate a particular judge more than once (this eliminates the problem of one lawyer giving several one-sided evaluations of one particular judge).[33]

The per-case method allows the research staff to check on the validity of responses, and to guard against skewed responses. Furthermore, as noted earlier, the use of an automatic follow-up letter (if the questionnaire has not been returned within 30 days of mailing) helps to ensure a high response rate.[34]

Another problem with respect to the selection of respondents is the role of memory. That is, after a certain period of time, the respondent may be able to recall little or nothing about the judge, or his or her recollections may be based on details which are relatively minor, or are inaccurate. For instance, it was found in New Jersey that favourable ratings for judges seemed to be generally higher on current performance evaluations (i.e. evaluations made just after the lawyer had concluded a case before the judge in question) than on evaluations completed several months after appearing before the judges.[35] Accordingly, the New Jersey program asks lawyers who appear in high volume courts (such as docket courts) to evaluate the judge based on the two-month period immediately prior to the evaluation.[36]

Thus, the New Jersey approach has the following advantages:

- it ensures that the respondents have personal knowledge of the judge or judges being evaluated;
- it guards against erratic, anomalous or biased responses; and
- it provides for automatic follow-up, thus ensuring a high response rate.

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[31]Maddi, *supra* n. 27, at 8.

[32]Maddi, *supra* n. 27, at 21.

[33]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 37-38.

[34]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 38.

[35]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 16-17.

[36]*See* the New Jersey Questionnaires in Appendix A.

This approach appears to have merit and should be seriously considered for use in the pilot project. We therefore recommend:

RECOMMENDATION 76

That the following two approaches be seriously considered for use in the pilot project:

(a) a 'per case' approach for judges who have been sitting in trial courts or preliminary hearings (major proceedings); and

(b) a survey of lawyers appearing regularly over a certain period of time before a given judge sitting in docket court; they should be asked to base their evaluation on the performance of the judge over the period of time, rather than on a specific trial.

(b) Criteria

As noted earlier, the New Jersey program enlisted the help of both lawyers and judges in determining the criteria to be used for evaluation. Examination of the New Jersey questionnaires (see Appendix A) reveals that the forms are divided into five basic sections:

- legal ability (knowledge of law and legal procedures, clarity and completeness of decisions, etc.);
- judicial management skills (organization, management of proceedings, etc.);
- comportment (open-mindedness, patience, lack of bias, courtroom courtesy, etc.);
- background characteristics of the respondent (information about the lawyer's background, such as size of firm, type of practice, experience, etc. Information is confidential and used to help establish whether a representative sample of the Bar is being surveyed, and whether there are different attitudes as between different groups of the Bar);
- comments (space for the lawyer or other person filling out the questionnaire to add comments with respect to the judge's performance).

The ABA Guidelines, too, recommend certain criteria to be employed in the evaluation program, i.e.:

- integrity (avoidance of impropriety or appearance of impropriety, and bias);
- knowledge and understanding of the law (soundness of legal decisions, knowledge of substantive, procedural and evidentiary law, application of precedents and so forth);
- communication skills (clarity of Bench rulings, quality of written opinions and sensitivity to impact of demeanour and other non-verbal communications);
- preparation, attentiveness and control over proceedings (courtesy, willingness to allow persons who are legally interested in a proceeding to be heard);

- management skills (devoting appropriate time to pending matters, discharging administrative responsibilities and knowledge of the number, age and status of pending cases);

- punctuality (prompt disposition of pending matters and meeting commitments on time);

- service to the profession and the public (attendance at and participation in judicial and continuing legal education programs);

- effectiveness in working with other judges of the same court.[37]

The Commission considers the determination of specific criteria for the surveys to be the responsibility of the Judicial Performance Committee or the staff responsible for carrying out the survey (or both). However, we believe that the general areas of evaluation, as set out in the New Jersey questionnaires and in the ABA Guidelines, are useful statements of the various components of judicial performance which should be reviewed.

A survey of Bar polls noted that, if few criteria were used, they were either summary or global (and therefore difficult for the lawyers to provide meaningful responses to). However, longer polls used specific descriptions of behaviour or qualities grouped under headings. The more specific the criteria were, the more accurate were the responses provided.[38] Accordingly, the components of evaluation should be separated. For example, rather than evaluating a judge on "bias", the respondent should be asked whether the judge had demonstrated "racial bias", "ethnic bias", or "sexual bias". Furthermore, the response formats should provide a way for the respondent to indicate "no opinion" or "no knowledge of information required".

The use of longer and more specific criteria (although increasing the accuracy of the responses) may result in a problem called "response fatigue". That is, in long surveys, the respondents may become tired and start to skip questions. This results in lower response rates, or incomplete questionnaires.[39] A related problem to "response fatigue" is the "sequence effect". That is, if similar questions are placed close together in a questionnaire, the respondents tend to give consistent responses (and fail to consider each question separately). It is preferable to associate individual questions with broader concepts (i.e. group several questions under a heading).[40]

Another effect which may show up in the questionnaires is that of connotation. That is, responses of "very likely" to statements with negative connotations (e.g. "has a sexual bias towards lawyers") may be seen as a more negative evaluation than a response of "very unlikely" to a positively phrased statement (e.g. "is equally fair to all parties").[41] To avoid connotation discrepancies, and to diminish the "invitation to criticize" effect, a uniform standard should be used.

We urge the Judicial Performance Committee to take note of the points raised here in its consideration of the design of the evaluation instrument.

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[37]American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 10-19.

[38]Maddi, *supra* n. 27, at 9.

[39]*Supra* n. 30, at 232.

[40]*Supra* n. 30, at 232.

[41]*Supra* n. 30, at 232.

Above all, the poll or questionnaire should maintain the distinction between judicial performance and the substance of rulings. Criteria which address the substance of rulings can impinge on judicial independence by exposing the judge to criticism on policy issues which have nothing to do with his or her actual ability.[42] Evaluations should address the way in which decisions are made, not the actual substance of those decisions; that is the province of appeal courts. We recommend:

RECOMMENDATION 77

That the evaluation questionnaire be concerned solely with judicial performance and not attempt to assess the substance of rulings.

(c) Confidentiality

Confidentiality and anonymity are necessary to assure the overall success and integrity of the program. Anonymity is needed to maximize the participation of respondents. The risk of biased responses made possible by anonymity is relatively slight and can be overcome by statistical methods that will counteract such responses. Confidentiality is required to assure the free flow and constructive use of information. Confidentiality must be safeguarded and secured in a manner which will be consistent with the goals of the program.[43] We recommend that:

RECOMMENDATION 78

That confidentiality and anonymity be assured to the respondents of the survey.

Some persons may be afraid that confidentiality will allow an irresponsible respondent to give information generated by vindictiveness instead of fact. If, however, an approach is used which allows the staff of the evaluation program to ascertain the respondent's identity (as permitted by, for example, the "per-case" approach), this will enable the staff to determine if the respondent's negative assessment is due to the fact that he or she is the losing counsel. Furthermore, the use of methodology which certifies the respondent's identity will act as a safeguard against one respondent giving several one-sided evaluations of the same judge (it will also point out respondents who consistently evaluate judges in the same way). Finally, if the staff know the identity of the respondent, it can then be established (through the use of court dockets, trial lists and other sources of information) whether or not the respondent has first-hand knowledge of the judge being evaluated.

All of these measures help to guard against vindictiveness or hearsay in the evaluation process by highlighting responses which are one-sided or provided by respondents who have no first-hand knowledge of the judge(s) being evaluated. Thus, extreme and "hearsay" evaluations (both favourable and unfavourable) can be discounted or disregarded.[44]

As noted earlier, in New Jersey, the staff members code both the name of the respondents and the name of the judge who is being evaluated, and enter this information into the computer. The information is protected by the use of passwords which allow only staff members to access the computer.

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[42]Maddi, *supra* n. 27, at 19.

[43]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 22.

[44]American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 29.

New Jersey uses the "aggregate data" approach (data from several surveys) in order to both avoid the problem of basing an assessment on simply one survey and to preserve confidentiality. The approach has two advantages:

- it provides data which can be given to the judge being evaluated, without allowing that judge to determine who the source of the data is;

- it allows the research analysts to identify and exclude responses which are much higher or much lower than the average response, thus eliminating biased responses (this protects the judge in question).[45]

The New Jersey program also provides for situations where the same lawyers appear before the same judge again and again (as is the case in our Provincial Court), making anonymity difficult, if not impossible. New Jersey employs historical or past performance questionnaires in such cases (assessment is based over a two-month period) and can delay the release of data to the judge or other persons in order to make it more difficult to guess who the respondents were. However, the questionnaires are sent out and required to be returned shortly after the respondent concluded the particular case or period of service before the judge in question, to reduce difficulties associated with memory.[46]

The New Jersey measures for achieving confidentiality, while at the same time protecting judges against "poison pen" responses, should be considered for use in Manitoba.

6. How Frequently Should Information Be Collected?

There are two related questions here:

1. When should the data be collected?

2. When should it be processed and released to the judge in question?[47]

Traditionally, data is collected in a single time period, i.e. once a year, or once every three years, and so on. However, there are alternatives, such as requiring lawyers to fill out standard questionnaires immediately after each major court appearance.[48] A further alternative would be to use the "per-case" approach (survey after major court appearance), but only to conduct evaluations on a periodic basis (e.g. for two-month periods, once every three years).

The ABA Guidelines state that data must be shared with judges on a regular and periodic basis. Evaluations should be carried out two years after the judge takes office. More experienced judges can be evaluated less frequently, subject to a maximum of four years between evaluations.[49]

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[45]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 12-13.

[46]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 29-30; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 30.

[47]*Supra* n. 10, at 304.

[48]*Supra* n. 10, at 304-305.

[49]American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 23-24.

A survey of Colorado judges indicated that several of the groups of judges surveyed felt the evaluation should be every two years (but no group of judges gave this choice majority support).[50]

In New Jersey, the permanent evaluation program started with the evaluation of newly-appointed judges, because it was felt that the primary objective of the program, the improvement of judicial performance, could best be accomplished through early evaluation, i.e. judges who had served two to four years of their first seven-year term (New Jersey judges are appointed for a seven-year term, and they are eligible for re-appointment for a further term of seven years).[51]

We have already expressed our conclusion that the pilot evaluation program should concentrate on newly-appointed judges as we believe that they would benefit most from evaluation (and be most likely to alter their conduct accordingly). As stated earlier, evaluation should be repeated on a regular, periodic basis, provided that the initial results of the program indicate it is successful.

7. What Uses Should Be Made of the Data Collected?

If self-improvement is the primary purpose of judicial evaluation, then the issues pertaining to the uses of the evaluation focus primarily upon how the results are distributed. Obviously, the results must be available to the judge in question. However, wider distribution presents problems. For example, should judges have access to evaluation information about other judges within their own court? If so, how should such information be released? Furthermore, should results be released to the public?[52]

There are several possible uses (apart from informing the public) of information gathered through the evaluation program. The New Jersey program incorporates the following guidelines:[53]

- Information may be provided to committees which are responsible for judicial education (provided that specific judges are not identified) to allow these committees to design educational programs for judges;

- Information in the form of aggregate data will be disclosed to particular judges to help them improve their performance;

- Information may be disclosed to administrative judges or to bodies charged with court administration to help assist in the placement and rotation of judges;

- Information concerning other judges (which does not identify those other judges) may be disclosed to particular judges, to help them appreciate how their colleagues did in certain categories of the evaluation.

Release of evaluation information to the Chief Judge of the Provincial Court would allow the Chief Judge to informally communicate problems in the behaviour or attitudes of the other judges to those involved, while at the same time giving the individual judges the opportunity to

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[50]Sterling, Stott and Weller, *supra* n. 18, at 421.

[51]*Supra* n. 5, at 3.

[52]*Supra* n. 10, at 307-309.

[53]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 50-51.

respond to criticisms they feel are unfair. In a sense, the Chief Judge would provide a "review" of the evaluation. As noted earlier, it is important to provide a "review mechanism" in the evaluation program (in New Jersey, the Judicial Evaluation Commission fills this role). We feel that the Chief Judge, by virtue of his or her position and relationship with the other judges of the Court, is ideally suited to act as reviewer.

The above guidelines are appropriate for a judicial evaluation program in Manitoba. The Commission recommends:

RECOMMENDATION 79

That the data from the judicial evaluation program not be released except as follows:

(a) data about a judge being evaluated should be released to that judge;

(b) aggregate data should be released to all judges who are being evaluated (for comparative purposes);

(c) specific data should be released to the Chief Judge (for the purpose of assigning judges and providing guidance to them);

(d) aggregate or anonymous data should be released to the Judicial Performance Committee (to assist in the identification of educational needs).

It has been argued that evaluations should be released to the public because this will give an incentive to the judges to improve. That is, the judges may be concerned with the public's view of them, or peer pressure may produce positive results.[54]

The objection to publication of the results is that the benefits of the program are to be gained through direct contact with the judge, and the public release of the results shifts the emphasis from self-assessment and self-improvement to appointment or retention.[55] This is inappropriate in Manitoba since judges, once appointed, have security of tenure.

It has been stated that, to maximize the influence of evaluation results, full public disclosure is needed. That is, commentators claim that public awareness provides a stronger impetus for change than if the data was not released to the public.[56] However, this observation may be more relevant to American jurisdictions where evaluation results are often released just prior to judicial elections.

The commentators recommend that the information generated by an evaluation program should be disseminated to as broad an audience as possible. The information should be detailed, with full explanations of findings and recommendations. However, it is advisable for the body conducting the evaluation to try to influence what results will be published by the media (through the use of press releases which draw attention to composite average ratings on specific performance criteria for judges evaluated, and the use of summary ratings of individual judges, if available).[57]

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[54]*Supra* n. 10, at 308.

[55]*Supra* n. 10, at 308-309.

[56]Maddi, *supra* n. 27, at 22; Philip, *supra* n. 28, at 18-19.

[57]Maddi, *supra* n. 27, at 22-23; Philip, *supra* n. 28, at 18.

The New Jersey Court Rules specifically provide that all records and information obtained and maintained by the Committee on Judicial Performance shall be confidential, and shall not be disclosed except to certain bodies for certain purposes, i.e. for self-improvement, or to identify judicial education needs, or for re-appointment consideration and so on. However, there is provision for public release:

> . . . [U]pon the written request of a judge, and for good cause, the Supreme Court may release evaluation information relating to the performance of the judge. The manner and content of any such disclosure shall be consistent with the objectives of the Judicial Performance Program, shall not reveal the names of responding individuals or specific court matters involved, and shall comport with notions of fairness to the judge and the preservation of the independence and integrity of the Judiciary.[58]

The last provision stated above (i.e. release to the public only upon consent of the Supreme Court of New Jersey) would appear to run contrary to the commentators' views that dissemination of results be to as broad an audience as possible. The New Jersey Supreme Court appears to take the view that results should be kept confidential and used for certain specific (court-related) purposes, except in situations where the judge who is being evaluated himself (or herself) requests that the information be released to the public.

The Commission is of the view that it is inappropriate, at this early stage, to contemplate public release of evaluation data. It is important to ensure that the pilot program (evaluation on an experimental basis) not be marred by any sensationalistic or superficial reporting of the results generated thereby. Furthermore, although most commentators recommend the release only of aggregate data (to protect the judges' identity), if the pilot program is to focus on newly-appointed Provincial Court judges, it will be difficult, if not impossible, to preserve judicial anonymity. Results which indicate that seventy-five percent of the newly-appointed judges obtained satisfactory evaluations will fuel media and public speculation as to who the "failing" judge is where, for example, there are only four judges being evaluated.

Perhaps, in the future, if the judicial evaluation program is established on a permanent, on-going basis, it may then be appropriate to allow public release of aggregate evaluation data. Such release should only take place with the consent of the judge or judges involved and of the administrators of the evaluation program. Accordingly, the Commission recommends:

RECOMMENDATION 80

That data from the pilot program not be released to the public.

RECOMMENDATION 81

That, when an on-going evaluation program is implemented, consideration should be given to the release of anonymous or aggregate data to the public and specific data about a given judge with the consent of that judge and the Judicial Performance Committee.

One final matter remains to be considered; the relationship of evaluation data to the judicial disciplinary process.

Both the New Jersey Report and ABA Guidelines stipulate that evaluation data should at no time be used as a basis for disciplinary purposes or proceedings.[59] The reason for this is

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[58]Rules of the Supreme Court of New Jersey, Rule 1:35A-3.

[59]New Jersey Supreme Court Committee on Judicial Performance, *supra* n. 2, at 25; American Bar Association, Special Committee on Evaluation of Judicial Performance, *supra* n. 2, at 31-36.

obvious. If evaluation information is used to discipline judges, the procedure is open to the fundamental criticism that it infringes on judicial independence and integrity. Indeed, the Supreme Court of Canada has authoritatively stated (as noted in the preceding Chapter on judicial discipline) that a judge must be removable only for cause related to the capacity to perform judicial functions and that cause must be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard.[60] This requirement of independent review and full opportunity for the judge to be heard is clearly violated if evaluation data is used to discipline (or even remove) the judge. Evaluation data cannot be linked to the disciplinary process. This linking is contrary both to the *Charter of Rights and Freedoms* and to the fundamental objective of judicial evaluation: the improvement of judicial performance without any infringement upon the independence and impartiality of the judiciary.

The Commission therefore recommends:

RECOMMENDATION 82

That evaluations not be used for disciplinary purposes.

C. CONCLUSION

The concept of a formal, on-going judicial evaluation program is clearly new to Manitoba. We believe, however, that such a program can be adopted here at modest cost and with no undue repercussions for the provincial judiciary. We urge the implementation of a pilot evaluation program. The Commission has given much time and thought to this project's advisability. We believe that a judicial evaluation program, carefully structured and sensitively implemented, will benefit both the public and the legal system of this province.

We have given great weight, in this Chapter, to New Jersey's on-going judicial evaluation program. New Jersey is, after all, a leader in this field; its evaluation process is the model for several other American jurisdictions and for the American Bar Association's Guidelines to Judicial Evaluation. While we are impressed with the thoroughness and care which has gone into the design of the New Jersey program, we recognize that the different conditions which prevail in our respective jurisdictions necessitate the careful consideration (rather than wholesale adoption) of the New Jersey program. Manitoba has a much smaller legal community (in terms of numbers of both lawyers and judges) than New Jersey; this, in turn, results in a greater familiarity between the Bar and the Bench in Manitoba than is possible in a jurisdiction as populous as New Jersey. Such differences have important consequences in respect of, for example, the measures used to provide confidentiality, the number of judges to be assessed, and so forth.

We emphasize that the implementation of a judicial evaluation program in Manitoba requires careful consideration of our legal system's needs and circumstances. The experiences and approaches of jurisdictions (such as New Jersey) which have established judicial evaluation programs can serve as useful guidelines in the design and operation of our own program. However, their value as guidelines does not mean that these programs offer the last word in judicial evaluation. We can and should institute an evaluation program designed specifically for use in and benefit to Manitoba's Provincial Court.

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[60] *Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 at 179-180 (S.C.C.).

CHAPTER 7

JUDICIAL IMMUNITY

A. INTRODUCTION

There is a well-established common law doctrine that judges must not be subjected to civil actions for acts which they do and words which they speak in the course of their duties.[1] As Winfield[2] points out, "[i]f it were otherwise, the administration of justice would lack one of its essentials, - the independence of the judges." This principle developed early in the common law and has survived, with modifications, to the present day.

One of the modifications which developed from the common law is the separation of inferior court judges from those of superior courts. This separation was, at one time, justified by the differing nature of these officers' jurisdictions. In this Chapter, we will examine the reasons for the distinction between inferior and superior court judges, and consider whether these reasons justify the continuation of different protection for these different courts.

The law relating to immunity of judicial officers is complicated and, although the subtleties and uncertainties of the early English legislation were, arguably, never clarified, that legislation has become the basis for most legislation enacted in Canada. Fine distinctions in interpreting words such as "judicial" and "jurisdiction" are required, and the ultimate effects of the doctrine and the legislation which attempted either to enshrine it or modify it have been unsatisfactory to many.

It is with these matters that this Chapter deals. The result of a doctrine of judicial immunity is often to leave a wronged litigant with no remedy for his wrong. Critics of the immunity doctrine focus upon the desirability of imposing some sort of personal liability upon the judicial officer. We shall explore the arguments raised by these critics and the alternatives employed by other jurisdictions (both Canadian and foreign). A recommendation will be made as to which, if any, of the alternatives should be adopted for Manitoba's Provincial Court.

In Manitoba, the liability of judges of limited jurisdiction has been regulated by both the common law and legislation. When the Magistrates' Courts were reorganized in 1972 into the Provincial Judges' Court, these judges were provided statutory immunity from civil actions, and that immunity was further incorporated into *The Provincial Court Act*[3] in 1984. The immunity provision has remained unchanged since 1984.[4] In order to understand the nature and scope of this protection, however, one must look to its development in the common law and in the law of England as it was in 1870 when Manitoba joined Confederation.

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[1]Of course, it should be borne in mind that the immunity to which we refer in this Chapter is not an absolute bar against proceedings against judges; judicial misconduct would still be subject to the disciplinary process outlined in Chapter 5.

[2]P. Winfield, *The Present Law of Abuse of Legal Procedure* (1921) 205.

[3]*The Provincial Court Act*, S.M. 1982-82-84, c. 52, s. 49.

[4]MAN, s. 49.

8. HISTORICAL PERSPECTIVE

1. The Law Prior to 1848

In the Middle Ages, the only way that an aggrieved party could challenge the decision of a court was by an accusation against the decision-maker[5] and, in fact, until the 14th century many courts did not distinguish between complaints against a judge and those against a judgment. These challenges were costly and lengthy.

In the King's Courts, however, where the proceedings were recorded on rolls of parchment, the record of the proceedings could not be challenged in this way. What was indicated on this record was final, and this "doctrine of the sanctity of the courts of record which originated by virtue of royal prerogative, thus survived because it eliminated time-consuming attacks on the findings of fact in the record."[6] To correct an error of law made by these courts, one used the writ of error.

Commentators suggest that the doctrine of judicial immunity developed from the doctrine of the sanctity of the record.[7] That latter doctrine lent a finality to judgments, and the former also developed to further this goal, by eliminating collateral attacks on judgments and by thereby strengthening the newly developing hierarchical appellate system.[8]

The first clear statements of the doctrine of judicial immunity for acts done in court came in the case of *Floyd* v. *Barker*[9] and *The Case of the Marshalsea*,[10] reported by Lord Chief Justice Coke.[11] In *Floyd*, Coke C.J. set out the policy considerations behind the doctrine, summarized as follows:

(1) the need for finality;

(2) the need for protecting the independence of common law courts from rival courts;

(3) the need for maintaining public confidence in the system of justice;

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[5]J.R. Block, "*Stump* v. *Sparkman* and the History of Judicial Immunity" (1980), 5 Duke L.J. 879 at 881.

[6]*Id.*, at 883.

[7]J.M. Feinman and R.S. Cohen, "Suing Judges: History and Theory" (1980), 31 S.C.L.R. 201 at 203-206; and *supra* n. 5, at 883-885.

[8]Block suggests that judicial immunity became accepted as a doctrine for this reason: *supra* n. 5, at 885. Feinman and Cohen simply assert that the doctrine was "a technical proposition concerning the nature of the record of a court of record": Feinman and Cohen, *supra* n. 7, at 206. It has also been suggested that the doctrine developed from the concept of sovereign immunity: F. Way, "A Call for Limits to Judicial Immunity: Must Judges Be Kings in their Courts?" (1981), 64 Judicature 390.

[9]*Floyd* v. *Barker* (1607), 12 Co. Rep.. 23 at 24 (Star Chamber); 77 E.R. 1305 at 1306.

[10]*The Case of the Marshalsea* (1612), 10 Co. Rep. 68b at 76a-76b; 77 E.R. 1027 at 1038-1039.

[11]Earlier cases on the question of immunity for judicial acts by judges of courts of record are conflicting. See *Green* v. *Hundred of Buccle-churches* (1589), 1 Leon 323 at 324 (C.P.); 74 E.R. 294, where Windham J. said that no action would lie against a justice of the peace because a justice of the peace is a judge of record and no action lies for what he does as judge; and *Windham* v. *Clere*, (1589) Cro. Eliz. 130 (Q.B.); 78 E.R. 387, where an action on the case may have succeeded against a justice of the peace acting within his jurisdiction when the justice "of his malice and own head" issued a warrant for arrest.

(4) a recognition that independent, conscientious judges would be most subject to prosecutions in the Star Chamber.[12]

The general immunity was, however, limited to acts done by a judge *as judge*. In the *Marshalsea Case*, the immunity became further limited to acts done within the jurisdiction of the court. The two limitations were interrelated, however, as an act done outside of a Court's jurisdiction was no longer regarded as a judicial act.

In the 200 years following Coke C.J., judges attempted additional distinctions designed to limit the general applicability of the doctrine. Whether or not a judicial officer was immune for acts done came to be dependent upon factors such as:

(1) whether the act was an abuse of jurisdiction or done with an absence of jurisdiction;[13]

(2) whether it was truly a judicial act or not;[14]

(3) whether it was done by a superior court or inferior court judge;[15]

(4) whether or not the act was malicious and without reasonable and probable cause.[16]

Many of the cases speak both of acts done and things said in the course of judicial duties as being protected. However, some writers suggest that one ought not to equate the doctrine of absolute privilege of things said in the course of judicial proceedings with the doctrine of immunity from liability for judicial acts.[17] In short, these are two distinct doctrines which should not be confused.

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[12]*Supra* n. 5, at 886-887. Both Block, *supra* n. 5, and Feinman and Cohen, *supra* n. 7, at 207-208, suggest that political considerations arising from the rivalry between the common law courts and other ones such as the Star Chamber played a part in the evolution of the doctrine.

[13]See, e.g. *Clerk and Lindsell on Torts* (15th ed. 1982) 1252-1253; *Davis* v. *Capper* (1829), 10 B. & C. 28 at 38 (K.B.); 109 E.R. 362 at 365, where a magistrate had jurisdiction to commit the plaintiff for a "reasonable" period of time for re-examination pending a trial, and it was held that to commit for 2 weeks was unreasonable and therefore without jurisdiction completely. See also *Bradley* v. *Fisher*, 80 U.S. (13 Wall) 335 (1868) at 351-353, where the distinction between acts done in "excess of jurisdiction" and those done in the clear absence of jurisdiction is discussed.

[14]See e.g. L.A. Sheridan, "Protection of Justices" (1951), 14 Mod. L. Rev. 267 at 276-278.

[15]See, e.g. *Taafe* v. *Downes* (1812), 3 Moore P.C. 36n (Ireland C.P.); 13 E.R. 15, the case usually cited as authority for the rule of absolute immunity for superior court judges. It appears to be based upon the concept of jurisdiction. That is, superior court judges must determine the limits of their jurisdiction, and therefore can never be said to exceed it, unless they act without colour of right. Inferior court judges, on the other hand, have their jurisdiction (and their acts in excess of it) open to inquiry by higher courts.

[16]This was only an issue with inferior courts. The question, however, has been discussed in numerous *obiter dicta*, which are often contradictory. See, e.g. *Cave* v. *Mountain* (1840), 1 Man. & G. 257 at 263 (C.P.); 133 E.R. 330 at 333, where Tindal C.J. said: "No case can be found in which a magistrate, acting within his jurisdiction, has been held liable in an action of trespass for a mere error in judgment. It would be a very different case if the defendent had acted with any malicious or improper motive, or with any want of *bona fides* in which he would be liable in a different form of action." Contrast this with Windham J.'s view in *Green* v. *Hundred of Buccle-churches*, *supra* n. 11.

[17]*See* R. Thompson, "Judicial Immunity and the Protection of Justices" (1958), 21 Mod. L. Rev. 517; A. Rubinstein, "Liability in Tort of Judicial Officers" (1964), U. of T. L.J. 317.

While an accurate statement of the law prior to 1848 would be difficult, the following tentative conclusions can be suggested:

1. Judges of superior courts were immune for all acts done and things said in the course of their judicial duties, unless they knowingly acted without colour of right;[18]

2. Judges of inferior courts of record were similarly immune, provided they acted in good faith and kept within their jurisdiction;[19]

3. Judges of inferior courts of record may have been liable for acts done and things said within their jurisdiction if they acted maliciously and without reasonable cause; and this liability may have included some judicial as well as ministerial acts.

2. The Law Since 1848

(a) *The Justices Protection Act, 1848*

Whatever the state of the common law in the years immediately before 1848, the British Parliament in 1848 enacted the *Justices Protection Act, 1848*.[20] Sections 1 and 2 of the Act draw a clear distinction between acts done within jurisdiction and acts done without jurisdiction, or in excess of jurisdiction. Because this statute appears to have been the basis upon which much of the current Canadian provincial law was enacted, sections 1 and 2 are reproduced here:

> s.1 That every Action hereafter to be brought against any Justice of the Peace for any Act done by him in the Execution of his Duty as such Justice, with respect to any Matter within his Jurisdiction as such Justice, shall be an Action on the Case as for a Tort; and in the Declaration it shall be expressly alleged that such Act was done maliciously, and without reasonable and probable Cause; and if at the Trial of any such Action, upon the General Issue being pleaded, the Plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the Defendant.
>
> s.2 That for any Act done by a Justice of the Peace in a Matter of which by Law he has not Jurisdiction, or in which he shall have exceeded his Jurisdiction, any Person injured thereby, or by any Act done under any Conviction or Order made or Warrant issued by such Justice in any such Matter, may maintain an Action against such Justice in the same Form and in the same Case as he might have done before the passing of this Act, without making any Allegation in his Declaration that the Act complained of was done maliciously, and without reasonable and probable Cause: Provided nevertheless, that no such Action shall be brought for anything done under such Conviction or Order until after such Conviction shall have been quashed, either upon Appeal or upon Application to Her Majesty's Court of Queen's Bench . . . .[21]

It should be noted that neither section 1 nor section 2 appear to create a cause of action against a justice; they merely state the procedure and form of action to be used in bringing any such suit.[22] Efforts to interpret this statute, then, suffer from the same problem as efforts to identify the common law previous to it: did causes of action in fact exist? Cases have attributed

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[18]*Supra* n. 15.

[19]*Cave* v. *Mountain*, *supra* n. 16.

[20]*Justices Protection Act, 1848*, 11 & 12 Vict. c. 44.

[21]*Justices Protection Act, 1848*, 11 & 12 Vict. c. 44, ss. 1 and 2.

[22]*Supra* n. 2, at 105.

different meanings to both of the provisions.[23] The discussion has differentiated the two areas which may give rise to judicial liability: acts within jurisdiction and acts done without jurisdiction or in excess of jurisdiction.

(b) Acts within jurisdiction

There is case law to suggest that inferior court judges (justices) were protected by the 1848 Act to a lesser extent than were judges of superior courts for acts done within their jurisdiction.[24] Superior court judges were never liable for acts done within their jurisdiction, whether they were malicious or not. This interpretation of the Act would appear to leave a justice open to liability for all malicious acts, whether the acts were within or outside of the justice's jurisdiction.

Other cases, however, suggested that justices would be liable for malicious acts within their jurisdiction *only* if they were ministerial or otherwise non-judicial acts. Justices were always protected if such acts were judicial in nature,[25] just as superior court judges were.[26] The distinction between judicial and administrative acts is very important in determining whether there will be liability.

The distinction, although often noticed and argued, is never really clarified. Mr. Justice Twaddle suggests impliedly that the distinction arose as a result of the broad authority possessed by justices of the peace until late in the 19th century:

> The name "justice of the peace" was first used, at least officially, in the 14th century: *Justices of the Peace Act 1361*. Landowners were entrusted in their local areas with the responsibility of keeping the peace and hearing charges in respect of offences against it. In the course of time, they came to be entrusted with administrative responsibilities as well, such as the issuance of liquor licences. Indeed, until late in the 19th century, they exercised many of the powers now exercised by local governments.[27]

The distinction came to be stated as one between those acts which involve the exercise of a discretion (where something must be heard and decided) and something which must be done, without any alternative choice. Indeed, in the 1849 case of *Linford* v. *Fitzroy*,[28] Lord Denman discusses the nature of the judicial/ministerial distinction in terms of whether a decision or a discretion is required.

Perhaps the clearest statement of the proposition that justices are protected for any judicial act within their jurisdiction is in the case of *Everett* v. *Griffiths*:[29]

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[23]Sheridan, *supra* n. 14, notes that the Act may have been intended to mitigate a harsh common law, or to merely declare the common law, or to create a new action against justices of the peace for malicious abuse of ministerial authority.

[24]As is the case with decisions prior to 1848, however, most of the cases cited in support of this view are not decisions on point, but rather statements by judges in *obiter dicta*. E.g. *Linford* v. *Fitzroy* (1849), 13 Q.B. 240 at 247; 116 E.R. 1255 at 1258, where a wrongful refusal of bail was not actionable in the absence of malice, as granting bail was a judicial matter within the jurisdiction of the justice; *Kendall* v. *Wilkinson* (1855), 4 El. & Bl. 680 at 692 (Q.B.); 119 E.R. 251 at 255, in which Coleridge, J. said: "The plain object of the statute was to give magistrates entire protection in regard to acts done, however irregularly, if within their jurisdiction, unless malicious and without probable cause." Further, Lord Denman's *dictum* in *Linford* v. *Fitzroy* was adopted in the courts of Upper Canada: *Conroy* v. *McKenny* (1854) 11 U.C.Q.B. 439; *Crawford* v. *Beattie* (1876), 39 U.C.Q.B.

[25]*Linford* v. *Fitzroy*, *supra* n. 24, where the issue decided was whether a decision to refuse bail was judicial or ministerial.

[26]See *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668 at 671 (C.A.).

[27]*Shaw* v. *Trudel* (1988), 53 D.L.R. (4th) 481 at 484 (Man. C.A.).

[28]*Linford* v. *Fitzroy*, *supra* n. 24, at 247; 1257-1258.

[29]*Everett* v. *Griffiths*, [1921] 1 A.C. 631 at 666 (H.L.).

> . . . [Judicial] immunity is not confined to judges of the High Court. It extends to all judges. The protection given to justices of the peace by the first section of the statute 11 & 12 Vict. c. 44, is not wanted, and does not apply, in respect of acts of a purely judicial nature relating to matters within the justices' jurisdiction. Its protection is wanted in respect of acts of a ministerial character, and its provisions have not the effect of rendering justices of the peace liable to be sued in respect of purely judicial acts, even if alleged to be malicious.

The common law, over the course of the next fifty to seventy-five years, evolved to a point where judges of inferior courts of record, *acting within their jurisdiction*, did gain the same immunity from suit as superior court judges. Winfield[30] points out that simply because there may have been a civil remedy in 1848 against justices of the peace for acts done in the execution of their duty, it does not follow that there was any such remedy later. Section 1 of the 1848 Act assumes that such an action existed, but that assumption may have been unfounded by 1848 or later and, in that case, "section 1 only baptizes something that never existed or has since died." In short, section 1 of the 1848 Act may be incorrect in appearing to state that an action could be brought against justices of the peace for all malicious acts done in the execution of their duties.

This was the view of Lord Bridge in *McC* v. *Mullan*,[31] and also of the unanimous Manitoba Court of Appeal in the recent case of *Shaw* v. *Trudel*.[32] Twaddle J.A., writing for the court, stated:[33]

> Nothing changed the law of England in this regard between 1848 and 1870. We therefore find that, when the law of England was received in Manitoba, justices were immune from civil action for judicial acts done within their jurisdiction. Neither malice nor lack of reasonable and probable cause could alter that.

The purpose of section 1 of the statute in the years following 1848 came to be to protect judges from suit for *ministerial* acts within their jurisdiction, if they acted in good faith. Considering the change in role and function of the justice from 1848 to 1989, it is questionable what use can be made of this protection today. Neither Lord Bridge nor Twaddle J.A. gave examples of administrative or ministerial acts which may fall under the ambit of this construction in modern times. In short, the changing role of the justice, and gradual development of the office of Provincial Court judge, may have rendered the provisions of section 1 obsolete. Our Provincial Court judges exercise judicial, not administrative, functions.

(c) Acts done without jurisdiction or in excess of jurisdiction

There were also developments in the case law which interpreted section 2 of the *Justices Protection Act*. Although this section appeared to confer a strict liability upon justices who exceeded their jurisdiction, there is some case law to suggest that the justice would remain protected if he had no means of knowledge of the facts which deprived him of this jurisdiction.[34] Blackburn J. in *Pease* v. *Chaytor*[35] seemed to suggest that a justice continued to act within his jurisdiction if he proceeded to exercise it in the erroneous (but honest) belief that he was within it. This would appear to have granted to inferior court judges the same protection as that given

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[30]*Supra* n. 2, at 217.

[31]*McC* v. *Mullan*, [1984] 3 All E.R. 908 at 916 (H.L.).

[32]*Supra* n. 27.

[33]*Supra* n. 27, at 486.

[34]Ignorance of the law, however, would not protect a justice, as he was always presumed to know the law: *Houlden* v. *Smith* (1850), 14 Q.B. 841 at 852-853; 117 E.R. 323 at 327-328.

[35]*Pease* v. *Chayton* (1861), 1 B. & S. 658 at 673-674 (Q.B.); 121 E.R. 859 at 865.

to superior court judges, as enunciated in the Irish case of *Taafe* v. *Downes*.[36] Indeed, this statement of the law was given further support in Lord Esher's *obiter dicta* in *Anderson* v. *Gorrie*:[37]

> To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction.

It seems that, in theory, all judges may have the same protection at common law; some commentators suggest that the only difference between the protection provided to superior court and inferior court judges is a practical, not theoretical one.[38] That is, because superior court judges have to determine the limit of their own jurisdiction, they can never be said to exceed their authority unless they act without colour of right. However, the jurisdictional authority of an inferior court is open to inquiry by a superior court.

Some cases which examine section 2 of the *Act* appear to accept the ignorance of law/ignorance of fact distinction. That is, ignorance of the law does not protect a judge from liability, but ignorance of fact does. However, these cases do not go so far as to provide that an "honest belief" of jurisdictional authority is sufficient to protect a justice from liability.[39] Indeed, Canadian case law considering the 1848 Act seems to suggest that the *bona fides* of the justice was only relevant to whether or not notice of the action was required under the Act (that is, there were procedural consequences only). The judge's liability in damages was not questioned.[40]

3. Conclusion As to Historical Perspective

The liability of judges of inferior courts of record, prior to the enactment of legislation in Manitoba, may be summarized as follows:

1. If the act was a judicial one and was within jurisdiction, there would be no liability, even if it was done with malice and without reasonable or probable cause.

2. If the act was not a judicial one, but was administrative, there would be no liability if it was within jurisdiction, unless malice or lack of reasonable and probable cause could be shown.

3. If the act was done in the absence of or in excess of jurisdiction, there would be no liability if the mistake as to jurisdiction was based upon ignorance or mistake of the facts.

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[36] *Supra* n. 15.

[37] See *supra* n. 26, at 671.

[38] *Clerk and Lindsell on Torts*, *supra* n. 13, at 1253-1254.

[39] *Supra* n. 34.

[40] *Spurrel* v. *Lauder et al* (1914), 6 W.W.R. 1051 at 1052 (Alta. S.C.), where the court found that the *Justices Protection Act, 1848* was in force in Alberta, but that a magistrate who issued a warrant for the arrest of a plaintiff, under which he was detained for 2 days, in the face of a statute which did not provide such authority, was liable in trespass, and was not entitled to the statutory 1 month notice period. *Sinden* v. *Brown* (1889), 17 O.A.R. 173 at 187, found that although the defendant honestly believed that he was acting within his jurisdiction, he was still liable in trespass due to his error of law but that, because he acted in good faith, he could rely upon the protection of the notice provisions of the Act.

4. If the act lacked jurisdiction but was based upon a mistake of law, it is unclear whether an honest belief or good faith would have immunized the act, but the better view may be that it would not have done so (i.e. there would be no protection for the judge).[41]

C. CURRENT LAW: CANADA AND THE UNITED KINGDOM

All Provinces and Territories of Canada, as well as the Parliament of the United Kingdom, have enacted statutes respecting the liability of judicial officers. As indicated previously, the legislation dealing with provincially-appointed judicial officers was, in most cases, modelled upon the 1848 *Justices Protection Act*. Therefore, the statutes distinguished between acts done with and without jurisdiction. "Jurisdiction", however, is not legislatively defined, so that the problems associated with this term at common law still exist under the various legislative schemes.[42] Very different principles apply to the protection afforded judges for these two fundamentally different acts. Therefore, to simplify our discussion of judicial immunity, we have broken down the review into three areas:

- acts within jurisdiction;
- acts outside of or in excess of jurisdiction;
- statements made in judicial proceedings.

The third category referred to above is not really a sub-category of judicial immunity. In fact, some commentators argue that liability for statements made during judicial proceedings is a separate area, with its own principles and limitations. However, because many of the lawsuits against judges are in respect of statements made by these judges, we have decided to include statements in our discussion of judges' liability and immunity.

1. Acts Within Jurisdiction

Five provinces (including Manitoba) and the two territories have enacted legislation which, like the 1848 Act, provides that no action will lie against a provincial judge, magistrate or justice[43] unless the act complained of was done maliciously and without reasonable and probable

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[41]Pickup, C.J.O., in *MacKenzie* v. *Martin*, [1953] 1 D.L.R. 161 at 167 (C.A.), aff'd [1954] S.C.R. 361, considered the former *Public Authorities Protection Act*, R.S.O. 1950, c. 303, s. 2, the wording of which was substantially similar to the 1848 Act, and said:

> The law as I see it is that a Magistrate is protected by the statute if he acts judicially and in good faith with respect to a matter within his jurisdiction. He may wrongly decide the matter, or make some order in the matter which he has no right to make without rendering himself liable for damages resulting from such order as he may make. If, however, he acts with respect to a matter which is not within his jurisdiction at all, and if lack of jurisdiction is not dependent on a question of fact, he gets no protection and is liable for the consequences of his act, notwithstanding that he acts judicially and in good faith.

See, however, the comments of Lord Bridge in *McC* v. *Mullan*, *supra* n. 31, at 920, where he discusses the difference between an act in excess of jurisdiction sufficient to warrant an order of certiorari, and one sufficient to warrant an action in damages against the justice.

[42]B. Feldthusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980), 29 U.N.B.L.J. 73 at 88.

[43]In Ontario, Provincial judges are dealt with under the *Courts of Justice Act*, S.O. 1984, c. 11, as amended, which appears to exclude justices of the peace. Justices of the peace would presumably be left with the protection provided under the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 2. In Prince Edward Island, justices appear to be treated differently from judges as well: PEI, ss. 11(1) and (2).

cause.[44] The Manitoba legislation does not specifically refer to the judge's "jurisdiction". Instead, it states:

> . . . [N]o action shall lie or be instituted against a judge, magistrate or justice of the peace for any act done by him in the execution of his duty as such unless the act was done maliciously and without reasonable and probable cause.[45]

In assessing the scope of this legislative protection, the same questions arise as were raised respecting interpretation of the 1848 Act: were these sections intended to modify the common law, or simply to declare it?

The Manitoba case of *Shaw* v. *Trudel*[46] was an action commenced against a former provincial judge. In interpreting Manitoba's legislation, Twaddle J.A. found that the law of England was adopted in Manitoba in 1870:

> As a magistrate, a provincially-appointed judge was immune from action, by virtue of the common law, for an act done as a judge acting within his jurisdiction and, by virtue of the statute of 1848, for an act done administratively, unless the administrative act was done maliciously and without reasonable and probable cause.[47]

The Manitoba Court of Appeal appears to have resolved conflicting views of the common law in the manner discussed previously. That is, all judicial acts done within jurisdiction would be protected. Similarly, administrative acts done within jurisdiction would be protected, unless the acts were malicious and done without reasonable and probable cause.

Nova Scotia's and Newfoundland's enactments respecting provincial judges, magistrates and justices of the peace are framed in language substantially similar to the 1848 Act. Case law considering the relevant provisions is meagre. Some assistance can be gained from the case of *MacKenzie* v. *Martin*.[48] Much of the discussion in that case dealt with whether the defendant magistrate acted within or without jurisdiction in requiring sureties of the plaintiff before he was released from custody. The majority found that the magistrate had not exceeded his jurisdiction, and *as there was no evidence of malice*, the claim was dismissed.

This statement supports the view discussed earlier: i.e., that the *Act* intended to allow liability against a magistrate who acted maliciously, within his jurisdiction. There was no discussion in this case as to the nature of the particular act involved; that is, whether it was judicial or ministerial. However, it appears from the case that the act was a judicial one.

A different view of the common law is supported by a more recent case from Ontario, *Unterreiner* v. *Wilson*.[49] Gray J. discussed both the common law and the applicability of the *Public Authorities Protection Act*.[50] He found that, although the statute did provide protection to judicial officers for any act done in the execution of their duties which was within their

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[44]SASK, s. 23; ALTA, s. 16(1); *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 4; *Justices' and Magistrates' Protection Act*, R.S.N.S. 1967, c. 157, s. 3; NWT, s. 17(3); YT, s. 63(1).

[45]MAN, s. 49.

[46]*Supra* n. 27.

[47]*Supra* n. 27, at 486-487.

[48]*MacKenzie* v. *Martin*, *supra* n. 41, at 365-369 (S.C.C.).

[49]*Unterreiner* v. *Wilson* (1982), 142 D.L.R. (3d) 588 (Ont. H.C.), aff'd (1983), 41 O.R. (2d) 472 (C.A.).

[50]*Public Authorities Protection Act*, R.S.O. 1980, c. 406.

jurisdiction (unless the act was done maliciously and without reasonable and probable cause), immunity was also provided by the general law of the Province of Ontario.[51]

That general law was the same as the law set out in *Halsbury's Laws of England*[52] and further stated by Lord Denning in the *Sirros* v. *Moore* decision.[53] Lord Denning suggested that the immunity for inferior court judges and superior court judges had evolved to the same point, so that, in his opinion, nothing would make any judge liable "except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it".[54] Once again, however, there is no discussion of the administrative/judicial function distinction in this case.

As to the issue of malice, Lord Denning concluded that the rule of absolute privilege for any act within a judge's jurisdiction would apply even where the judge ". . . was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness. . . ."[55] In short, judges are not liable for any act done by them in a judicial capacity. They are only liable for acting in bad faith, knowing that they have no jurisdiction to do so (this is a very broad immunity).

Legislation in Manitoba, Saskatchewan, Alberta, the Yukon Territory and the Northwest Territories respecting magistrates and provincial judges also seems to provide for liability for acts done within jurisdiction, but in all cases except Manitoba and Prince Edward Island[56] the relevant sections specifically contemplate acts done either within or in excess of jurisdiction. In this way, the sections differ from the 1848 Act. These provinces chose to use words different from the 1848 Act. It may be that they intended to change the law in some way from the old English law. Judicial interpretation of these statutes, however, would not appear to bear this out. Cases have been found from Manitoba (the *Shaw* v. *Trudel* case, discussed earlier) and Saskatchewan which both refer to and adopt the law of England as it evolved toward the end of the 19th century.

Manitoba's legislation, as noted earlier, expressly provides that judges will only be liable for acts which are done maliciously and without reasonable and probable cause.[57] Therefore, malice must be shown; otherwise, the judge is protected. Similar provisions (with explicit requirements for acts to be done maliciously) are found in the legislation of Alberta, Saskatchewan and the Northwest Territories.[58] The protection afforded territorial judges and justices in the Yukon Territory is slightly different; a judge or justice will not be liable for acts done in the performance of his or her duty or in respect of a matter in which he or she lacked or exceeded jurisdiction unless it is proved that the judge "acted in bad faith or with gross negligence."[59] Malice is not expressly required (although "bad faith" must be shown).

New Brunswick's statute merely states that an officer of the law may not be subject to any action for any act done under and by virtue of any Act of the Legislature or of Parliament.[60] This

[51] *Unterreiner* v. *Wilson* (1982), 142 D.L.R. (3d) 588 at 597 (Ont. H.C.).

[52] 4th ed., vol. 1, 197, paras. 199, 200, 206 and 210.

[53] *Sirros* v. *Moore*, [1974] 3 All E.R. 776 (C.A.).

[54] *Supra* n. 53 at 785.

[55] *Supra* n. 53, at 782.

[56] These statutes do not mention "jurisdiction" at all.

[57] MAN, s. 49.

[58] ALTA, s. 16(1); SASK, s. 23; NWT, s. 17(3).

[59] YT, s. 63(1).

[60] *Protection of Persons Acting Under Statute Act*, R.S.N.B. 1973, c. P-20.

would appear to provide that officers acting within jurisdiction are completely protected, as there is no mention of malice limiting this protection (i.e. they are protected whether their acts are malicious or not).[61] However, cases suggest that the common law is to apply, notwithstanding the wording of the statute. The interpretation of the common law is unclear; there is some question as to whether a judge's act would be protected if it were done maliciously.[62]

The remaining provinces, British Columbia, Québec, Ontario and Prince Edward Island, have legislation specifying that provincial judges (including justices in British Columbia and Québec) have the same immunity from civil suit as Superior Court justices.[63] Once more, the common law must apply in each of those provinces, and the older common law is somewhat clearer with respect to superior court judges than the law concerning inferior court judges. There is also the added advantage of a Supreme Court of Canada authority on this point.[64]

In summary, the legislation in the provinces of Nova Scotia, Newfoundland, Manitoba, Saskatchewan, Alberta, (and Ontario and Prince Edward Island regarding justices of the peace only), as well as in the Yukon Territory and the Northwest Territories and in the United Kingdom, contemplates the application of the common law principles of judicial immunity with respect to lawsuits for acts done within jurisdiction. Further, although the New Brunswick legislation does not refer to the common law of judicial immunity, case law suggests that the common law may apply in that province as well.

Unfortunately, the precise interpretation of the common law is not settled in any of the above jurisdictions, with the possible exception of Manitoba and the United Kingdom. In these two jurisdictions, (and arguably, the other jurisdictions as well), it may be that, although the legislation appears to contemplate liability for any act committed within jurisdiction where that act is malicious and/or without reasonable and probable cause, the common law has evolved to the point where at least judicial acts (of a court of record) would be protected. The leading English authority (*McC* v. *Mullan*) does not discuss the judicial/administrative distinction, so protection for acts done within jurisdiction may be broader in the United Kingdom than in Manitoba. Manitoba appears to retain this judicial/administrative distinction (i.e. judicial acts are protected, administrative acts which are malicious or without reasonable and probable cause are not protected).

As to the issue of malice, in the *McC* v. *Mullan* decision, Lord Bridge of Harwich concluded that ". . . the old common law 'action on the case as for a tort' against justices acting within their jurisdiction maliciously and without reasonable and probable cause no longer exists."[65] Therefore, according to Lord Bridge, the old rule that there is liability for acts within jurisdiction (but done maliciously and contrary to good faith), no longer applies to the lower-ranking judicial officers, i.e. magistrates. However, it should be noted that His Lordship's comments were *obiter dicta*, as there was no issue with respect to malice in this appeal.

Legislation in British Columbia, Québec, Prince Edward Island and Ontario states that inferior court (i.e. Provincial Court) judges have the same immunity from suit as superior court judges. The common law in this regard is clearer. Superior court judges are immune from action for any judicial act done by them unless they knowingly (and perhaps in bad faith)

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[61]*Supra* n. 42, at 89.

[62]*Charters* v. *Harper* (1986), 31 D.L.R. (4th) 468 at 471-472 (N.B.Q.B.); *Somerville* v. *Lynch* (1986), 74 N.B.R. (2d) 438 (Q.B.T.D.).

[63]ONT, s. 98; PEI, s. 11(2); BC, s. 37; *Magistrate's Privileges Act*, R.S.Q. 1977, c. P-24, s. 1, as am. by S.Q. 1982, c. 32, s. 117.

[64]*Morier* v. *Rivard*, [1985] 2 S.C.R. 716.

[65]*Supra* n. 31, at 916.

exceeded their jurisdiction or acted without jurisdiction. In those cases, they no longer act *qua* judge.[66]

2. Acts Done Without Jurisdiction or In Excess of Jurisdiction

Manitoba's legislation, like that of Prince Edward Island (respecting justices), does not distinguish between acts within or without jurisdiction. Our Act provides:

> Except as provided in this Act, no action shall lie or be instituted against a judge, magistrate or justice of the peace for any act done by him in the execution of his duty as such unless the act was done maliciously and without reasonable and probable cause.[67]

Much would appear to depend upon the interpretation of the phrase "in the execution of his duties". "If that phrase is interpreted as meaning 'within jurisdiction', there would either be strict liability in trespass, or liability for knowing error, depending upon whether or not *Sirros* v. *Moore* were adopted".[68] There is, however, authority for the proposal that "in the execution of his duty" means something different from "within the limits of the jurisdiction".[69] Presumably the difference would be that "duty" is a wider concept than "jurisdiction", and could include the *purported* exercise of jurisdiction. If this is the case, ". . . the legislatures may have contemplated liability only when the act loses its judicial character, as where the judge knowingly exceeds jurisdiction".[70]

In *Shaw* v. *Trudel*, Twaddle J.A. referred to the immunity provided by the 1848 Act for administrative acts within jurisdiction (there is immunity unless these acts are done maliciously and without reasonable and probable cause). His Lordship stated:

> The Manitoba legislation extended this latter immunity to cover acts which, though done in the execution of duty, were in excess of jurisdiction.[71]

Therefore, it appears to be necessary to establish malice and lack of reasonable and probable cause for acts done without jurisdiction in Manitoba. Otherwise, the judge will be protected. This statement of the law may be compared to the English position, which holds that a judge will be liable where he or she knowingly acts without jurisdiction. *Shaw* v. *Trudel* may be espousing the same rule, if one accepts that acting maliciously and without reasonable cause (the phrase used in *Shaw*) is tantamount to knowingly acting without jurisdiction.

Nova Scotia, Newfoundland, and Ontario (with respect to justices of the peace)[72] have affirmed the common law and the 1848 Act, as the legislation in each jurisdiction states that it is

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[66]*Supra* n. 10, at 762-766; 1038-39.

[67]MAN, s. 49.

[68]*Supra* n. 42, at 90.

[69]*Supra* n. 64, at 736:

> . . . unlike the legislation applicable in other jurisdictions, s. 16 makes no distinction depending on whether the act done or omitted was done or omitted without jurisdiction or in excess of jurisdiction. "Duty" and "jurisdiction" should not be confused. Section 16 states "in the execution of their duty". It does not state "within the limits of their jurisdiction".

[70]*Supra* n. 42, at 90.

[71]*Supra* n. 27, at 487.

[72]*The Justices' and Magistrates' Protection Act*, R.S.N.S. 1967, c. 157, s. 3; *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 5; *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 3.

not necessary to prove malice or want of reasonable and probable cause to maintain an action for an act *done without jurisdiction*.

In England, there is strict liability (but also indemnification) for lower ranking judicial officers who exceed their jurisdiction. However, in order for there to be indemnification, the justices must have acted in good faith.[73] In *McC* v. *Mullan*, it was made clear that not every act in excess of jurisdiction will give rise to an action for damages against the justice. For example, a mere procedural irregularity would cause *certiorari* to lie, but would not expose the justice to personal liability.[74]

Perhaps a stronger argument may be made that the English common law doctrine of strict liability also applies in Canada if one points to the existence of section 783 of the *Criminal Code* of Canada,[75] section 7(1) of the Ontario Act, and section 14(1) of the Newfoundland Act.[76] These provisions permit a reviewing court, upon quashing a conviction or order, to issue an order protecting the judge who made the error from tort liability. Section 783 of the Code reads:

> Where an application is made to quash a conviction, order or other proceeding made or held by a provincial judge acting under Part XIX or a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may, in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice or provincial court judge or against any officer who acted under the conviction order or other proceedings or under any warrant issued to enforce it.

The Québec Court of Appeal[77] considered this section and found that, as a general rule, this type of a protection order should be made in the absence of misconduct, malice, or an oblique motive by the judge of the inferior court.[78] This implies that, if the potential protection offered by this section were to be removed, liability would be possible even in respect of an order made in good faith. The legislation of Ontario and Newfoundland contains provisions which are substantially similar to section 783 of the Code.

In Saskatchewan, Alberta, the Yukon Territory, and the Northwest Territories[79] the legislation requires proof of malice and lack of reasonable and probable cause in order to maintain an action in respect of a lack or excess of jurisdiction. This is the same requirement, as discussed earlier, for actions in respect of errors within jurisdiction. This clearly creates broader judicial immunity than what was available at common law and under the 1848 Act. It may provide protection for all judges which is similar to the immunity for all acts except those where the judge did not act judicially and knew of his error. That is the standard expressed in the *Sirros* v. *Moore* case.[80]

In New Brunswick there is simply a prohibition against suing a judge for an act performed within jurisdiction. One writer suggests that the effect of this is the same as in Nova Scotia and

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[73] *Justices of the Peace Act, 1979* (U.K.), c. 55, s. 53.

[74] *Supra* n. 31, at 917. This principle, that there are a range of acts in excess of jurisdiction, and not all will found actions for damages against the judge, was accepted by the Supreme Court of Canada in *Morier* v. *Rivard*, *supra* n. 64, at 745. That case considered the immunity of superior court judges.

[75] CC, s. 783.

[76] *The Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 7(1); *The Justices and Other Public Authorities (Protection) Act*, R.S.N. 1970, c. 189, s. 14(1).

[77] *Mayrand* v. *Cronier* (1981), 63 C.C.C. (2d) 561 (Que. C.A.).

[78] *Id.*, at 572.

[79] SASK, s. 23; ALTA, s. 16(1); YT, s. 63(1); NWT, s. 17(3).

[80] *Supra* n. 53, at 785.

Newfoundland.[81] That is, there would be strict liability for acts done without jurisdiction. The case law[82] in this area is unclear. One case does state that because, *inter alia*, no allegation was made that the defendant had knowingly acted without jurisdiction,[83] the claim should be dismissed. In short, there would only be liability where the judge exceeded his jurisdiction (or acted without jurisdiction) and knew of his or her error.

In summary, recent Manitoba case law suggests that the legislation has the effect of requiring malice and want of reasonable and probable cause to frame an action against a judge for an act outside of jurisdiction. Similar wording in the Prince Edward Island statute (dealing with justices) would perhaps lead to a similar conclusion. Once again, if malice and lack of reasonable and probable cause are equated with "knowledge", then, according to *Sirros* v. *Moore*,[84] immunity is the same for all judges regardless of their court. The *Sirros* v. *Moore* case is not, however, a completely accepted authority.[85]

In three provinces[86] and the United Kingdom, the legislation is similar to the 1848 Act and may either provide for: (1) strict liability for any act performed in excess of or without jurisdiction or (2) an acceptance of the dicta in *Sirros* v. *Moore* granting immunity similar to that provided to superior court judges. The first proposal has been accepted in the United Kingdom and is more likely to be the case in Canada. This is not as strict as it may seem, however, because (as noted earlier) not every act by a justice which exceeds his or her jurisdiction is sufficient to found an action in damages against that justice.

In Saskatchewan, Alberta and the two territories, there is liability for acts outside of jurisdiction, only if malice and want of reasonable and probable cause is shown. It is unclear whether the House of Lords' distinctions between degrees of extra-jurisdictional acts would apply in those provinces as well. It is also unclear whether malice and lack of reasonable and probable cause amount to the same thing as *knowingly* acting without jurisdiction, such that Lord Denning's statements in *Sirros* v. *Moore* would apply.

In British Columbia, Québec, Ontario and Prince Edward Island, judges of inferior courts have the same immunity as judges of superior courts. Following case law from the 17th century to the 20th century,[87] these judges will be protected for any act done within their jurisdiction. It is important to note, however, that, because superior courts have a greater jurisdiction than inferior courts, they will also have a greater immunity.

3. Immunity for Statements Made in Judicial Proceedings

The law appears to be settled that no action for libel or slander lies against a judicial officer respecting statements made in court. Statements made in the course of judicial proceedings by judges are absolutely privileged. It has been noted that the defence of absolute privilege in defamation actions has often been equated with judicial immunity for judicial acts. However, the

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[81] *Supra* n. 42, at 90.

[82] *Charters* v. *Harper*, *supra* n. 62, and *Somerville* v. *Lynch*, *supra* n. 62.

[83] *Somerville* v. *Lynch*, *supra* n. 62, at 447.

[84] *Supra* n. 53, at 785.

[85] *Supra* n. 31.

[86] Nova Scotia, Newfoundland and Ontario (only re justices).

[87] *Taafe* v. *Downes*, *supra* n. 15; *Morier* v. *Rivard*, *supra* n. 64.

two defences may in reality be quite distinct.[88] "Neither the bases nor the purposes underlying the two types of immunity are identical."[89]

Absolute privilege is provided, by common law, to superior courts and inferior courts, so long as the tribunal is exercising judicial functions. Thus, in cases where magistrates were exercising administrative functions (such as the issuing of licenses), they were not so protected.[90]

The question of jurisdiction again arises. Clerk and Lindsell declare that "There can be no judicial proceeding where there is nothing before a court with which it has jurisdiction to deal".[91] Street, however, offers the following view:[92]

> Judges are protected although their statements are malicious and irrelevant. . . . It is usually stated that the privilege is lost when the court has no jurisdiction. The cases usually cited are not on the point, and, in the absence of authority, it must be regarded as unsettled whether courts other than superior courts (the latter are probably always privileged) are protected when acting in excess of jurisdiction: the desirable rule would appear to be that the privilege applies whenever the proceedings are not manifestly in excess of jurisdiction.

The only Canadian case on this point is *MacKenzie* v. *MacArthur*.[93] In that case, the Court refused to dismiss a plaintiff's statement of claim which alleged that the Chief Coroner had defamed him. After reviewing some of the authorities, Locke J. decided that, while there are no exceptions to the doctrine of absolute privilege in superior courts, the doctrine of *ultra vires* applied to inferior courts. His Lordship cited an older English case in support of this view. However, the judicial/non-judicial distinction is apparently confused with the within/without jurisdiction distinction. That is, the authority cited to support Locke J.'s claim that lower court judges' statements are not protected when the judge is exceeding his jurisdiction is not really concerned with the within/without jurisdiction issue. Instead, the case was based on whether the judge was exercising his judicial functions or not.[94]

In further support for his jurisdictional limitation, Locke J. cites the Chief Justice of Ontario in the *MacKenzie* v. *Martin*[95] decision. However, as we have seen, this case dealt specifically with a judicial act, not with words spoken.

Although the common law is unclear, it would appear that the better view is that there is no strict jurisdictional limit to the doctrine of absolute privilege for things said by judges in the course of their judicial duties. That is, the privilege will apply whether or not the judge in question is properly exercising his or her jurisdiction.

It is generally assumed that this privilege applies even where malice is alleged.[96] However, in *Munster* v. *Lamb*,[97] the Court held that the reason for the privilege was not to

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[88]Thompson, *supra* n. 17, at 518-520.

[89]Rubinstein, *supra* n. 17, at 331.

[90]*Royal Aquarium* v. *Parkinson*, [1892] 1 Q.B. 431 (C.A.).

[91]*Clerk and Lindsell on Torts*, *supra* n. 13, at 943.

[92]*Street on Torts*, (7th ed. 1983) 323.

[93]*MacKenzie* v. *MacArthur*, [1981] 4 W.W.R. 692 (B.C.S.C.).

[94]*Seaman* v. *Netherclift* (1876), 1 C.P.D. 540 at 543.

[95]*MacKenzie* v. *Martin*, *supra* n. 41, at 167 (Ont.C.A.).

[96]Rubinstein, *supra* n. 17, at 332.

[97]*Munster* v. *Lamb* (1883), 11 Q.B.D. 588 at 607 (C.A.). See also *Law* v. *Llewellyn*, [1906] 1 K.B. 487 at 491 (C.A.).

protect persons who had spoken with malice, but to protect those who had spoken in good faith (who under a different rule would find themselves defending actions).

A decision of the British Columbia Supreme Court in 1964[98] looked at the relationship between this absolute privilege at common law, and the *Magistrates Protection Act*, then in force in British Columbia. That Act provided for actions for acts done maliciously and without reasonable and probable cause. The court stated:[99]

> There is nothing, in my opinion, in the words of sec. 23(1) to show any clear intention to cut away or modify the privilege which the common law affords judicial officers against actions for defamation.

The Court then pointed out that the 1848 Act was in force in England when the leading case of *Law* v. *Llewellyn* was decided, and a limitation of absolute privilege, based on malice, was not suggested in that case. Therefore, the protection will apply whether the statement is malicious or not.

The common law defence of absolute privilege is available to both superior and inferior court judges, provided that the words in question were spoken during the course of judicial duties. The rule applies even where malice is alleged. Although it has been stated to be limited to judicial officers acting within their jurisdiction, these statements are often based on questionable authority. *The Defamation Act*[100] in Manitoba specifically retains all common law defences and immunities in actions for defamation.

Although the defences of absolute privilege for judges' statements and absolute immunity for judges' acts are often discussed together, the basis and scope of the defences are somewhat different.

Further, this privilege seems to apply in the case of the non-compellability of judges to give evidence respecting their decisions in further proceedings.[101] The reasons offered are based upon the same policy considerations, i.e. that judicial officers should not have to defend or explain words they have spoken in a judicial capacity.

D. ANALYSIS

1. Policy Reasons for Immunity

Most common law jurisdictions profess similar underlying rationales for protecting justices from civil suits.[102] The justifications for judicial immunity put forward by early English

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[98] *Schwartz* v. *Smith* (1964), 47 W.W.R. 570 (B.C.S.C.).

[99] *Id.*, at 572.

[100] *The Defamation Act*, R.S.M. 1987, c. D20, s. 10(5).

[101] *MacKeigan* v. *Hickman* (1988), 43 C.C.C. (3d) 287 (N.S.S.C.), aff'd 46 C.C.C. (3d) 191 (N.S.C.A.).

[102] See e.g. *Bradley* v. *Fisher*, *supra* n. 13; *Morier* v. *Rivard*, *supra* n. 64; *McC* v. *Mullan*, *supra* n. 31; *Unterreiner* v. *Wilson*, *supra* n. 49; *Janson* v. *King*, (1979), 103 D.L.R. (3d) 189 (Sask. Q.B.); *Shaw* v. *Trudel*, *supra* n. 27. Also see *Nakhla* v. *McCarthy*, [1978] 1 N.Z.L.R. 291 (C.A.).

judges[103] are echoed and reinforced in a later statement by Mr. Justice Field of the United States Supreme Court:[104]

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

There are, in addition to this premise of judicial independence, other reasons advanced for the existence of a rule of immunity. One commentator[105] puts forward reasons, several of which are identified by other writers as well. These include:

1. There are other, more appropriate ways to vindicate the rights of individuals wronged by judicial acts (for example, the judicial disciplinary process);

2. It saves public expense and court time involved in maintaining and defending such actions;

3. Judges owe a duty to government and the public interest, not to individual litigants;

4. To allow such suits would be to diminish public respect for the judiciary;

5. To allow such suits against judges would be manifestly unfair due to the uncertain nature of the decision-making process itself; that it would presuppose the existence of an objectively "correct" decision;

6. The existence of such liability would lead to fear, and deter qualified people from accepting judicial service;

7. Litigation would be unending, as dissatisfied litigants would always have the option of claiming damages against judges by whose decisions they feel injured.[106]

Although numerous reasons and justifications have been advanced supporting a general rule of immunity, many commentators take exception to the rule itself, and put forward strong arguments against each justification.[107] They argue instead for a qualified or limited form of immunity.

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[103]E.g., *Fray* v. *Blackburn* (1863), 3 B & S 576 at 578; 122 E.R. 217:

> It is a principle of our law that no action will lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; . . . . The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of Judges, and prevent their being harassed by vexatious actions.

[104]*Bradley* v. *Fisher*, *supra* n. 13, at 347.

[105]E.G. Jennings, "Tort Liability of Administrative Officers" (1937), 21 Minn. L.R. 263.

[106]*Ibid.*, at 271-272. See also *Bradley* v. *Fisher*, *supra* n. 13; *supra* n. 42, at 77.

[107]J. Johnson, "Note on Re Yoner" (1971), 4 Ottawa L. Rev. 627.

One commentator discusses the various limiting formulae which have been advanced to date.[108] He suggests that the distinctions which have been drawn by the courts[109] are all attempts to find an appropriate limiting formula for the general rule of immunity. He goes on to suggest that perhaps none of these attempts strikes the proper balance between the strong public interest to be maintained by a rule of judicial immunity, and the undesirability of a social group conferring absolute immunity upon itself. The commentator writes:

> Moreover, in cases of gross judicial misconduct, the general rationales of tort liability may be more important than the rationales which support judicial immunity.[110]

It has also been argued that the immunity granted to judges may contravene the equality guarantee found in section 15 of the *Canadian Charter of Rights and Freedoms*.[111] It is suggested that, by protecting only a small segment of society against personal liability for acts done or things said, the doctrine of judicial immunity has the effect of treating that group differently from other groups in our society.[112] However, such a conclusion would, at this point, be speculative at best. Furthermore, even if such immunity does amount to a violation of the equality provisions of the *Charter*, we believe the immunity would likely be found to be within the "reasonable limits . . . demonstrably justified in a free and democratic society" contemplated by section 1 of the *Charter*.[113]

2. Proposals for Reform

A number of proposals have been suggested for reforming the current immunity rule and the limitations which have developed within it. In this section, we will consider these proposals and recommend which one (if any) should be adopted for Manitoba's Provincial Court judges.

(a) Actual malice standard

The actual malice standard is the most commonly advanced reform proposal.[114] As one writer says:

> Almost without exception, critics of the doctrine of judicial immunity have agreed on one point: It is one thing, they say, to protect a judge from his honest mistakes, but it is something quite different for the judicial system to protect judges who purposely use their authority to inflict harm or deprive others of their rights.[115]

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[108] *Supra* n. 42.

[109] E.g., between levels of courts, between judicial and non-judicial acts, and among jurisdictional errors (errors within jurisdiction, in excess of jurisdiction, entirely without jurisdiction, and abuses of jurisdiction).

[110] *Supra* n. 42, at 106-107.

[111] *Canadian Charter of Rights and Freedoms*, s. 15, being Part I of the *Constitution Act,1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[112] D. Gibson, "Tort Law and the Charter of Rights" (1986), 16 Man. L.J. 1 at 8-9.

[113] *Canadian Charter of Rights and Freedoms*, s. 1, being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[114] The test used in some civil law countries of Europe includes liability for damages in cases of deceit, fraud or extortion (Italy), and in the Federal Republic of Germany, for "intentional wrongdoing": M. Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsibility" (1983), 31 Am. J. Comp. L. 1.

[115] *Supra* n. 5, at 922.

Such a standard would have the effect of giving practical effect to the liability for malice as expressed in various provincial statutes.[116] This would further tort objectives of compensating victims of malicious decisions, as well as deterring judicial acts motivated by bad faith, corruption, caprice or ill-will.[117]

The difficulty of defining "malice" in this context has been considered as well. One solution has been to adopt the definition used in the case of *New York Times* v. *Sullivan*[118] whereby a judicial act would be malicious if it was done with actual knowledge that it was incorrect, or with reckless disregard of whether it was incorrect or not.[119] Further, the plaintiff would have the burden of proving malice.

As desirable as this solution sounds, we have concluded that the difficulties associated with it militate against the malice standard being used as a basis for judicial liability. Independent proof of intention or motive is difficult to establish, and normally could not be determined without a trial. As most dissatisfied litigants would readily allege malice in their pleadings, "the damage to the policies supporting immunity would be inflicted by the fact of a trial, no matter what the verdict."[120] The use of summary judgment or dismissal procedures would not be of much assistance, as intent and credibility are issues which normally require determination by trial rather than by summary proceedings.[121]

(b) Negligence standard

According to one commentator:

> The malice standard satisfies the hunger for justice to some extent but it does not go far enough because while it ensures honesty and freedom from abuse of judicial power it does not decrease incompetence within the judiciary. The integrity of a judge is rarely questioned but his competency often is.[122]

"Judicial malpractice" suits, analogous to malpractice suits for other professionals, have been suggested. One commentator has written that the "future independence of the judiciary might be strengthened by demonstrating to the public and to the bar that the bench will not allow a few judges to hide their unreasonable conduct behind absolute immunity."[123] Once again, the concept of compensating victims of judicial wrongdoing is an admirable one, but the application of a negligence standard is even more unworkable than a malice standard.[124]

Negligence, measured according to traditional concepts of "duty" and "standard of care" has never been accepted as the basis of judicial tort liability. Most of those who advocate its use

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[116] *Supra* n. 107, at 632.

[117] Note, "Liability of Judicial Officers Under Section 1893" (1969), 79 Yale L.J. 322 at 334; F. Way, *supra* n. 8, at 399.

[118] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[119] This suggestion is made by Feinman and Cohen, *supra* n. 7, at 262.

[120] *Supra* n. 5, at 922.

[121] Note, "Torts - Judicial Immunity: A Sword for the Malicious or a Shield for the Conscientious?" (1978), 47 U. Mo. Kan. City L. Rev. 81, cited in J.R. Block, *supra* n. 5, at 880, n. 4.

[122] *Supra* n. 107, at 633.

[123] *Supra* n. 8, at 399.

[124] *Supra* n. 24, at 108.

in the modern common law suggest something more,[125] such as "serious professional error". This would be an "error so serious that a judge normally careful of his duties would not have made, or an error that could only have resulted from a very serious neglect of duty".[126]

Even with the above limitation, it is clear that this is a very broad basis of liability, and on that basis suffers many of the same faults as a malice standard. One writer points out that the "inherent problems of the fact-finding process would be particularly acute" under this standard:[127]

> Because a defendant judicial officer is a "professional", his conduct would be measured against the standards of competence in his profession. Experts would confront the finder of fact with a confusing array of testimony almost certain to bog down a trial, particularly if the case is tried to a jury.... The real possibilities for "hounding" in this situation are obvious.

If the goal is to find some way to ensure competence, it is submitted that there are more practical and effective ways to do this (in particular, the evaluation program referred to in Chapter 6 of this Report). Judicial liability on a negligence standard supports the notion that "inroads upon judicial immunity . . . would deter even competent persons from accepting judicial roles".[128]

(c) The judicial process approach

Block[129] suggests an alternative which (in his opinion) is derived from the same policies which led to the development of the doctrine of judicial immunity. Because judicial immunity was developed to protect the appellate system from collateral attacks on judgments ". . . [t]he availability of appellate correction of error is, therefore, absolutely central to the logic of judicial immunity".[130] Based upon this premise, where there is another means of correcting a judicial "injustice" (such as appeal or review), judges should be immune, and where no such alternative means of redress exists, the injustice must be compensated for by tort liability.

It is clear that this standard is insufficient to compensate all inappropriate decisions. As Johnson[131] notes, not everything done by a judge or magistrate can be appealed. Habeas corpus proceedings can be taken for a wrongful detention, but if compensation is the objective, even one or two hours of wrongful imprisonment is an injury. The deficiencies of this approach militate against its usefulness for Manitoba's Provincial Court.

(d) Vicarious liability of the state

This proposal is one which has been suggested by some writers as a solution either concurrent with personal liability,[132] or as a scheme which is completely government funded.[133]

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[125]In some European civil law countries, however, liability is possible on the basis of gross negligence: *see supra* n. 114 re the Federal Republic of Germany, Spain and Greece.

[126]*Supra* n. 107, at 634.

[127]Note, *supra* n. 117, at 335.

[128]Note, *supra* n. 117, at 355.

[129]*Supra* n. 5, at 923-24. *See also supra* n. 105.

[130]*Supra* n. 5, at 914.

[131]*Supra* n . 107, at 632.

[132]Rubinstein, *supra* n. 17, at 335.

[133]*Supra* n. 42, at 108-110.

The latter is a trend noted in many European countries and exemplified by the Federal Republic of Germany and France.[134] The model goes beyond the statutory provisions (discussed earlier) whereby the state indemnifies judges found liable in damages. One commentator states that:

> This state liability is exclusive in the sense that the victim - a party in a lawsuit or even a third person - has no action against the judge but can only sue the state for damages. This solution is clearly intended to be a further "shield" of judicial independence: one wants to protect the judge from harassing litigation brought by dissatisfied litigants, while at the same time giving the victims of judicial wrong-doing the best possible assurance of reparation for their damages...[135]

Cappelletti goes on to note that, in other countries, vicarious state liability is concurrent with personal liability of the judge, but that the "shield effect" is missing in these situations. Further, rigorous procedural limitations in bringing such actions (at least in Italy and Belgium, for example) show that the solution in these countries "differs sharply in its theoretical premise from - but is quite similar in its practical results to - the traditional common law solution"[136] (i.e. judicial immunity with limited exceptions such as excess of jurisdiction, and perhaps malice[137]).

This trend is not as clearly identifiable in common law jurisdictions. Academics have suggested striking a better balance between the conflicting values of independence of the judiciary and the democratic accountability of public servants, but as noted by Cappelletti,[138] "no vicarious (exclusive or concurrent) liability of the state has emerged". Arguments have usually focused on the development of a workable standard to measure personal liability. Although the concept of a state "shield" for judicial liability is interesting, the approach represents such a tremendous departure from the common law tradition that it is unlikely to be a workable option here. Furthermore, while the "vicarious liability" doctrine serves to shift liability to the state, it does not provide guidelines as to when such liability would be incurred. The question of what acts constitute grounds for judicial liability would still remain unclear.

(e) The immunity of superior court judges

We have noted throughout this Chapter that traditionally, there has been a distinction between the immunity granted to superior court judges and the corresponding protection afforded inferior (i.e. provincial) judges. In short, the immunity conferred on the judiciary of the superior courts is broader, clearer, and simpler than that granted to the inferior courts. We have seen that in several areas, questions of limitation of the immunity principle (i.e. less protection) are raised with respect to inferior court judges, but are not suggested as possible limitations on the protection granted to superior court judges. For example, it is not necessary to distinguish (for superior court judges) between judicial/administrative acts or acts which are within/without jurisdiction. The immunity of superior court judges is absolute, unless the judge did something which he knew he did not have jurisdiction to do.

The words of Justice Field of the United States Supreme Court, quoted earlier, make it clear that the purpose of judicial immunity is to ensure that a judicial officer shall act on his or her own convictions, and thus be free of any fear that a wrong decision will result in personal liability. If this is indeed the rationale behind the development of the doctrine, it is, as Lord Denning stated in *Sirros* v. *Moore*, difficult to see any justification for the creation of different

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[134] *Supra* n. 114, at 33-34.

[135] *Supra* n. 114, at 34.

[136] *Supra* n. 114, at 43.

[137] *Supra* n. 114, at 44.

[138] *Supra* n. 114, at 46.

rules for different levels of the judiciary. The words of Rand J. in the *MacKenzie* v. *Martin*[139] case, where he would have found a magistrate liable for damages (notwithstanding that the magistrate acted in good faith) appear to be contrary to the current trend of widening judicial immunity. This widening of immunity is Lord Denning's view:

> As matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'[140]

Notwithstanding the logic of Lord Denning's statements above, we have seen that many jurisdictions maintain a double standard of protection. Inferior court judges are treated differently from superior court judges. We have also seen, however, that in jurisdictions where legislators have chosen words somewhat different from the 1848 Act, the common law may be evolving more closely toward Lord Denning's modern view of it. Finally, some jurisdictions have chosen to do away with the statutory distinction entirely (e.g. Ontario, British Columbia, Québec). In these jurisdictions, the same judicial immunity applies to both superior and inferior courts.

Is there any reason for maintaining this distinction between superior and inferior court judges? Historically, inferior court judges were linked with justices of the peace. This historical union is reflected in our current legislation, which offers the same immunity to Provincial Court judges, justices of the peace and magistrates.[141]

Should this union be continued? The role of Provincial Court judges over the years has diverged sharply from the English justices of the 19th century. In this Report, we have noted that the office of Provincial Court judge was the result of the gradual judicialization of the magistracy. In fact, the very creation of the office of Provincial judge was a recognition of the expansion of this officer's jurisdiction, primarily in criminal law (but also in other areas). The English justices who acted as judges of record, peacekeepers, rates commissioners, and so forth, exercised functions which were as administrative in nature as they were judicial. Perhaps there is some rationale for extending to those whose jobs are primarily "administrative" a lesser degree of protection than that granted to those who perform only judicial functions. However, this rationale is no longer applicable to Provincial Court judges. There is no justification for offering these members of the judiciary less protection than that provided to other judges of record. Other provinces have abolished the distinction between the different levels of courts, without any noticeable adverse consequences.

If provincial judges are granted judicial immunity comparable to that afforded superior court judges, the extent of this immunity would be greater (and less confusing) than the protection currently extended to provincial judges. Furthermore, the inequitable disparity between the protection provided to superior and inferior court judges would be removed. We therefore recommend:

RECOMMENDATION 83

That Provincial Court judges have the same immunity from suit as superior court judges.

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[139] *MacKenzie* v. *Martin*, *supra* n. 41, at 376 (S.C.C.).

[140] *Supra* n. 53, at 785.

[141] MAN, s. 49.

CHAPTER 8

THE CHIEF JUDGE

A. INTRODUCTION

In this Chapter, we consider certain issues which relate specifically to the position of Chief Judge of Manitoba's Provincial Court; in particular, we will examine the following issues:

(i) method of appointment;

(ii) term of office;

(iii) discipline; and

(iv) role.

We will examine the approaches of other Canadian jurisdictions to the above issues. There is little in the way of legal literature or other critical analyses with respect to this topic.[1] Therefore, the Commission has endeavoured to note the provisions of other Canadian jurisdictions which may provide useful guidance respecting these issues.

B. APPOINTMENT

Although Manitoba's Provincial Court has had a Chief Judge since its creation in 1972 (and there was a Chief Magistrate for many years before that), there is, in fact, no requirement that an appointment to that position be made. The decision whether to appoint a Chief Judge is entirely within the discretion of the Lieutenant Governor in Council (the provincial Cabinet).[2] This is in accord with the situation in most other Canadian jurisdictions;[3] only the legislation in British Columbia, Alberta, Québec and the Yukon Territory requires the appointment of a Chief Judge.[4]

A common approach to the method of appointment of Chief Judges can also be found in most Canadian jurisdictions. In Manitoba, the Chief Judge of the Provincial Court is appointed by the Cabinet,[5] a method duplicated in almost every other province and territory. Even the jurisdictions which make use of review committees and nominating committees in the

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[1]One recent study which examines the history, role, duties and responsibilities of the Chief Justices and Chief Judges of the various Canadian courts is the Canadian Institute for the Administration of Justice, *Compendium of Information on the Status and Role of the Chief Justice in Canada* (1987).

[2]MAN, s. 8(1).

[3]NB, s. 2(2); NFLD, s. 9(1); NS, s. 3(2); ONT, s. 63(1); PEI, s. 2(1); SASK, s. 10(1); NWT, s. 5(1).

[4]ALTA, s. 2(3); BC, s. 6(1); PQ, s. 90; YT, s. 47(1).

[5]MAN, s. 8(1).

appointment of their provincial judges leave the appointment of the Chief Judge to the sole discretion of the government. The only exception to this is the Northwest Territories, where the Judicial Council is required to consider candidates for the position of Chief Judge and make recommendations.[6]

Similar uniformity can be found in the qualifications for appointment as Chief Judge. In most jurisdictions, including Manitoba, the only qualification is that the Chief Judge be appointed from amongst the sitting judges of the Court. Only Newfoundland sets out more specific qualifications; in that province, a judge may not be appointed as a Chief Judge unless he or she

> (a) has been a member in good standing of the Bar of Newfoundland for at least ten years immediately preceding the date of his appointment as Provincial Court judge; or
>
> (b) was a member in good standing of the Bar of Newfoundland immediately preceding his appointment as Provincial Court judge and the aggregate of his years of service as Provincial Court judge and his years in good standing as a member of the Bar of Newfoundland prior to his appointment as Provincial Court judge is at least ten years; or
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> (c) although not a member of the Bar of Newfoundland previous to his appointment as Provincial Court judge, has been serving as a Provincial Court judge for at least twelve years and has received, since his appointment as Provincial Court judge, a degree in Law, which is not an honorary degree or one secured by correspondence, granted to him by a University or School of Law of any Province of Canada, Great Britain or Northern Ireland . . .[7]

It is clear to us that the Provincial Court must have a Chief Judge. The considerable administrative needs alone of this busy Court justify such a requirement. We recommend:

RECOMMENDATION 84

That The Provincial Court Act be amended to require the appointment of a Chief Judge of the Provincial Court.

In Chapter 3 of this Report, we expressed the view that the appointment of provincial judges should not be left to the sole discretion of the government. We proposed that the government be required to make its appointments from a list of names provided to it by a nominating committee which would seek applications and recruit candidates.

In our view, the reasons for those recommendations apply equally to the position of Chief Judge. We believe that the Chief Judge should be selected and appointed in the same manner.

In preparing its list of names, the nominating committee should not be restricted to considering only sitting judges of the Provincial Court. While it is probable that Chief Judges will usually be appointed from sitting members of the Court, the nominating committee should be entitled to reach outside the Court if it feels that qualified candidates may thus be recruited.

We recommend:

RECOMMENDATION 85

That the Chief Judge of the Provincial Court be appointed in the same manner as the other judges of that Court; that is, the Chief Judge should be appointed by the Lieutenant Governor in Council from a list of names provided to the Attorney General by a nominating committee.

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[6]NWT, ss. 5(1) and 31(1)(a).

[7]NFLD, s. 10.

RECOMMENDATION 86

That all sitting provincial judges and any other person eligible for appointment as a provincial judge be entitled to apply to the nominating committee for the position of Chief Judge.

Any Associate Chief Judges who may be required should be appointed in the same manner.

C. TERM OF APPOINTMENT

The Provincial Court Act provides that judges hold office during good behaviour.[8] Indeed, the *Valente* case[9] makes it clear that provincial judges are constitutionally entitled to tenure during good behaviour, irrespective of what the legislation may say on the point.

However, both the *Valente* case and *The Provincial Court Act* are silent on the term for which the Chief Judge holds that position. Other Canadian jurisdictions are similar to Manitoba in this regard, but there are some exceptions.[10] In New Brunswick, the Chief Judge is appointed for a term of ten years and is eligible for re-appointment for one or more additional terms.[11] In Nova Scotia, the Chief Judge is appointed for such term as the Lieutenant Governor in Council may determine.[12] In the Yukon Territory, the Chief Judge is appointed for a five-year term (subject to a condition of good behaviour), and cannot be reappointed for two consecutive terms.[13] In both Québec and Saskatchewan, judges are appointed as Chief Judge for a term of seven years. In Québec, the seven-year term is not renewable, but the Chief Judge of the Court of Québec is to remain in office until he or she is replaced. Furthermore, after seven years of performing the duties of that office, the Chief Judge is entitled to one year's absence with salary to be devoted to studies, research or any other legal activity compatible with the judicial function. In addition, a judge who has held the office of Chief Judge for at least seven years is entitled to receive a salary which is not less than the salary he or she was receiving upon ceasing to be Chief Judge.[14] In Saskatchewan, the Chief Judge will hold office for a term of seven years or until he or she resigns as Chief Judge, or attains retirement age, or is removed from office following disciplinary proceedings.[15]

In light of the *Valente* decision, it seems clear to us that the notion that a Chief Judge may hold office at the pleasure of the government is contrary to the constitutional requirement that judges' tenure must be secure against discretionary or arbitrary influence by the appointing

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[8]MAN, s. 3(3).

[9]*Valente* v. *The Queen* (1985), 24 D.L.R. (4th) 161 (S.C.C.).

[10]Ontario offers the Chief Judge the right to elect to cease to perform the duties of that office and to assume the office of a provincial judge only, where the judge in question has continued in the office of Chief Judge for at least five years, or has continued in that office after attaining the age for retirement: ONT, s. 65.

[11]NB. s. 2(3).

[12]NS, s. 3(2).

[13]YT, s. 47.

[14]PQ, ss. 91, 92 and 116.

[15]SASK, s. 10(1).

authorities.[16] We believe that only two options exist in recommending a term of office for the Chief Judge:

(a) he or she may hold office for a fixed term during good behaviour; or

(b) he or she may hold office for an indefinite term during good behaviour.

There are certain advantages to a fixed term during good behaviour. Foremost among these is the introduction of a new perspective and new vigour to the job from time to time. The danger of the incumbent becoming stale and inflexible in the job is lessened. However, the disadvantages must be weighed against this. Will the authority of the Chief Judge be respected when it is known that he or she will in due course return to being an ordinary judge? Will this problem be exacerbated during the Chief Judge's final "lame duck" months in office? Issues respecting reappointment must also be considered. If the Chief Judge is eligible for reappointment, might this give rise to the perception that he or she might act in a manner calculated to ensure such reappointment? If he or she is not eligible for reappointment, will the resulting frequent change-overs be disruptive to the continuity of the Court?

On balance, we believe that the interests of a well-administered Court and the requirements of judicial independence are best served by a Chief Judge holding office for an indefinite term, subject to a condition of good behaviour. We recommend:

RECOMMENDATION 87

That the Chief Judge hold that office during good behaviour.

At some point in his or her tenure, a Chief Judge may wish to step down from that position, but still remain a Provincial Court judge. That should certainly be permitted. Furthermore, a Chief Judge who has served in that position for some time should not be financially penalized for such a decision. We think that a Chief Judge should be able to resume normal duties as a judge of the Court at any time and should be able to do so without any reduction in salary after completion of ten years' service as Chief Judge. Such a provision may offer the additional benefit of encouraging periodic transition, without the loss of authority that might result from the automatic changeover required by a fixed term. We recommend:

RECOMMENDATION 88

That the Chief Judge be permitted to step down from that office at any time and thereafter carry out the normal duties of a Provincial Court judge.

RECOMMENDATION 89

That if, after completing ten years of service as Chief Judge, the Chief Judge decides to step down from that office and resume duties as a judge of the Provincial Court, his or her salary should remain at the level normally paid to the Chief Judge.

The same provisions, with appropriate modifications, should apply to any Associate Chief Judge.

[16] It is, however, interesting to note that, when the conduct of Chief Judge Harold Gyles became the subject of an inquiry by the Judicial Council, the then government of Manitoba revoked his appointment as Chief Judge by Order in Council. This was done six months *before* the hearing of the Judicial Council began: *Re Gyles* (July 11, 1988, Judicial Council of Manitoba, unreported).

D. DISCIPLINE

In Chapter 5 of this Report, we recommended a new disciplinary process for the Provincial Court. That new process should apply equally to the Chief Judge. However, there are a few additional issues which relate specifically to that position.

As part of our proposed new process, it was recommended that upon the filing of formal charges against a judge of the Provincial Court, the judge in question should be suspended (usually with pay) until the formal inquiry into the charges against him or her. The same provision would apply to the Chief Judge. That is, if this person is suspended as a judge, he or she would also be suspended as the Chief Judge. In this situation, the most senior of the Associate Chief Judges of the Provincial Court should replace the suspended Chief Judge.

However, in some situations, it may be alleged that the Chief Judge has engaged in conduct which is inappropriate for a person holding the office of Chief Judge, but which is not so serious as to justify complete suspension. In this situation, the Judicial Inquiry Board should be able to waive the suspension of the Chief Judge as a judge of the Provincial Court, while maintaining the suspension of the Chief Judge as Chief Judge. That is, he or she would be able to carry out the normal duties of a judge of the Provincial Court, but would not be allowed to carry out the duties of the Chief Judge. As indicated, the waiver of the suspension of the Chief Judge as a judge of the Provincial Court would be in the discretion of the Judicial Inquiry Board.

Similarly, the Judicial Council, as one of the sanctions available to it, should be able to suspend or remove the Chief Judge as Chief Judge, while leaving him or her as an ordinary judge of the Court. All of the other sanctions available to the Judicial Council, as stated earlier, would also be applicable to the Chief Judge. That is, the Council could extend the suspension of the Chief Judge as Chief Judge, or the Council could suspend the Chief Judge from carrying out all judicial duties whatsoever. Furthermore, the usual sanctions available, from a reprimand up to and including removal from the Provincial Bench, would be as applicable to the Chief Judge as they are to any other judge of the Provincial Court.

We recommend:

RECOMMENDATION 90

That, if formal charges are filed by the Judicial Inquiry Board against the Chief Judge, he or she be automatically suspended both as a judge of the Provincial Court and as the Chief Judge of that Court.

RECOMMENDATION 91

That the Judicial Inquiry Board be empowered, in its discretion, to suspend the Chief Judge from that office, while at the same time allowing him or her to carry out the normal duties of a judge of the Provincial Court.

RECOMMENDATION 92

That, if the Chief Judge is suspended from that office, either by the Judicial Inquiry Board pending a formal inquiry or by the Judicial Council upon disposition of any charges against the Chief Judge, the most senior of the Associate Chief Judges should replace the Chief Judge for the duration of the suspension.

RECOMMENDATION 93

That the Judicial Council be empowered to order the following additional sanctions specifically in respect of the Chief Judge:

(a) suspension from the office of Chief Judge for a definite period of time;

(b) removal from the office of Chief Judge, without affecting the individual's status as an ordinary judge of the Court.

The same provisions should apply to any Associate Chief Judges.

E. ROLE

The Manitoba legislation, like that of most other Canadian jurisdictions, contains only the most general discussion of the duties and powers of the Chief Judge of the Provincial Court. This is largely because any consideration of the Chief Judge's role raises complex issues relating to court administration and the workings of government generally. These matters are well beyond the scope of this Report.

The Provincial Court Act presently provides that "[t]he Chief Judge has general supervisory powers in respect of judges, magistrates and justices of the peace and assigning judges, magistrates and justices of the peace for hearings as circumstances require and shall perform such administrative and other duties as the minister may direct."[17] However, it is important to note that the power of the Chief Judge to supervise and direct the other judges of the court is somewhat circumscribed. The *Valente* decision points out that the constitutional requirements of independence and impartiality of Provincial Court judges encompass not only the independence of the Court (institutional independence), but also protect the independence of each judge (individual independence). In short, the judges must be free from arbitrary interference not only from the government, but also from their fellow judges (including the Chief Judge).

In view of the foregoing, it is not possible for us to define exhaustively the role of the Chief Judge. However, in our consideration of the other issues of this Report, we have made recommendations which will have the effect of significantly altering the present responsibilities of the Chief Judge. These include an important screening and mediation function as the "first tier" of the new disciplinary process and the responsibility of reviewer in the recommended judicial evaluation program.

These duties are in addition to the general role of the Chief Judge as administrator and supervisor of the Court, its judges, staff and activities. The legislation should continue to express the Chief Judge's role in general terms, and we find the provision in *The Court of Queen's Bench Act* respecting its Chief Justice to be a useful model.[18] We recommend:

RECOMMENDATION 94

That the Chief Judge of the Provincial Court of Manitoba be responsible for the general overall supervision of the judges of the Court and the supervision and direction over Court staff in matters that are assigned by law to the judiciary of the Provincial Court.

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[17]MAN, s. 8(2).

[18]*The Court of Queen's Bench Act*, S.M. 1988-89, c. 4; C.C.S.M. c. C280, ss. 20(1) and 24(1).

CHAPTER 9

EXTRA-JUDICIAL ACTIVITIES

A. INTRODUCTION

Judges engage in a variety of activities beyond their normal duties as judges. They chair commissions of inquiry, write legal texts, and act as arbitrators and law professors. Their involvement in some of these activities is considered to be beneficial to the community and the judiciary, while their involvement in others is controversial and possibly detrimental to the individual judge and the judiciary in general.

In this Chapter, we examine the participation of provincial court judges in these extra-judicial activities.[1] We begin with the legislative basis for their participation in such activities. Following a consideration of the relevant legislation in Manitoba and other Canadian jurisdictions, we set out proposed standards of judicial conduct contained in model statutes and the arguments for and against the continued involvement of judges in extra-judicial activities. With the help of this background information, the Commission will address two questions:

(1) Should provincial court judges in Manitoba be permitted to participate in extra-judicial activities?

(2) If yes, what limitations, if any, are necessary for the participation of provincial court judges in such activities?

B. CURRENT LAW

1. Canadian Jurisdictions

The extra-judicial activities of Provincial Court judges are dealt with by statute in every Canadian province and territory with the exception of Prince Edward Island. The general restriction on extra-judicial activities of judges found in these statutes is basically the same: subject to exceptions, all of a judge's time must be devoted to his or her judicial duties and he or she must not engage in any business, profession, trade or occupation.[2] The legislation in each province differs with respect to the exceptions to that general rule and the requirements which must be met.

The activities permitted in Alberta, Ontario and the Northwest Territories are not specifically enunciated. The legislation in these jurisdictions simply provides that the Lieutenant Governor in Council (the Commissioner in the Northwest Territories) may authorize a judge to

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[1]The following is a list of the commissions in which provincial judges have participated in Manitoba: Gyles, mid-1970's, Juvenile Justice Committee; Kimelman, 1984-86, Indian and Metis Adoptions and Placements Review Commission; Kopstein, 1988, Autopac Review Commission; Sinclair, 1988-present, Aboriginal Justice Inquiry.

[2]BC, s. 8(1); ALTA, s. 12; SASK, ss. 19(1) and (2); MAN., s. 10(1); ONT, s. 53(1); PQ, s. 129; NB, s. 13(1); NS, s. 10(1); NFLD, s. 18(1); YT, s. 11(1); NWT, s. 9(1)(a).

participate in activities other than his or her regular duties as a judge.[3] The Northwest Territories legislation also stipulates that a judge (other than a deputy judge) cannot act as an agent, solicitor or counsel in any proceeding before a judge or justice of the peace.[4]

Manitoba and Nova Scotia legislation is more specific. Manitoba legislation permits a full-time judge (in addition to winding up his law practice or acting as master of the Court of Queen's Bench[5]) to act ". . . as adjudicator pursuant to an appointment and designation under the Human Rights Code, . . ." or as a ". . . commissioner, arbitrator, adjudicator, referee, conciliator, umpire or mediator on any matter or proceeding . . . on the direction of the Lieutenant Governor in Council."[6] Nova Scotia legislation is similar. It provides that the express authorization of the Governor in Council is required for a judge to practise any profession or actively engage in any business, trade or profession or devote less than full time to the performance of his duties as judge[7] and, in addition, a judge is prohibited from acting as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission, inquiry or proceeding unless expressly authorized by a provincial statute, the Governor in Council or the Attorney General.[8] Manitoba's legislation also regulates remuneration for extra-judicial activities. The legislation prohibits a full-time judge from accepting a salary, fee or other remuneration for work in any business, trade, profession or occupation, and permits him or her to receive (on the direction of the Lieutenant Governor in Council) only reasonable travel and other expenses incurred away from his or her ordinary place of residence in the capacity of commissioner, arbitrator, adjudicator, referee, conciliator, umpire or mediator in the same amount and under the same conditions as if performing judicial duties.[9]

The remaining provinces and the Yukon Territory require consultation with or the approval of the Chief Judge for participation in an extra-judicial activity. In British Columbia, for example, the legislation provides that the Lieutenant Governor in Council ". . . may, with the approval of the chief judge, assign other duties to a judge in place of some or all of his judicial duties in accordance with any conditions contained in the order assigning the judge."[10]

The New Brunswick and Québec legislation is particularly detailed. New Brunswick's legislation provides that every judge must devote himself or herself to his or her judicial duties and cannot practise, carry on or conduct any business in the profession or practice of law nor engage in any business, trade, profession or occupation without prior approval in each case of the Lieutenant Governor in Council.[11] He or she may, however, perform the duties of a juvenile court judge, duties assigned by order of the Lieutenant Governor in Council and administrative duties assigned by the Lieutenant Governor in Council.[12] With respect to these administrative duties, the Lieutenant Governor in Council may by order designate any board, commission or

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[3]ALTA, s. 12; ONT, s. 53(1); NWT, s. 9(1)(a). In Ontario, where a provincial judge had the consent of the Attorney General to act as an arbitrator or conciliator before s.53(1) came into force, he may continue to so act: ONT, s. 53(2).

[4]NWT, s. 9(1)(b).

[5]MAN, ss.10(4) and (5).

[6]MAN, s. 10(1)(b).

[7]NS, s. 10(1).

[8]NS, s. 10(2).

[9]MAN, ss. 10(2) and (3).

[10]BC, s. 8(2). See also NFLD, s. 18; YT, s. 11(2); and SASK, s. 19.

[11]NB, s. 13(1).

[12]NB, s. 13(2).

other administrative tribunal as one on which a judge may be assigned to serve as chairman.[13] The Lieutenant Governor in Council cannot assign a judge but must request the Chief Judge to assign a judge to serve as chairman for a specific term of not more than 5 years; the Chief Judge is then obliged to assign a judge with 2 or more years of judicial experience.[14] The judge must perform the duties of chairman of the board, commission or tribunal according to the statute establishing it[15] and cannot perform any judicial functions nor any other assigned duties during the assignment period.[16] He or she receives remuneration and other benefits payable under the Act, and pension provisions continue to apply.[17] Before the assignment expires, the Lieutenant Governor in Council may request the Chief Judge to assign a judge to serve for a second term of not more than 5 years; the Chief Judge is obliged to assign the same or another judge.[18] The same obligations and benefits accrue to this judge.[19] Where a judge is absent from his or her duties as chairman, the Lieutenant Governor in Council may request the Chief Judge to assign a replacement during the absence.[20]

Québec's legislation provides that a judge, after consultation with the Chief Judge and with the authorization of the Minister of Justice, may function as an arbitrator or member of an organization performing such functions or be appointed by the Solicitor General as a part-time coroner.[21] In addition, a judge may carry out a mandate entrusted to him or her by order of the government after consultation with the Chief Judge, or a mandate entrusted to him or her by the Governor General in Council with the prior authorization of the government.[22] Finally, with the written consent of the Chief Judge, a judge may teach.[23] As in Manitoba, the legislation also regulates salaries for extra-judicial work. A judge is entitled only to his judicial salary plus an expense allowance fixed by the Act for work as an arbitrator or coroner.[24] He or she may receive additional salary determined by the government for work under a government mandate; a judge may also, with the consent of the provincial government, receive a salary or fee determined by the Governor General in Council for work under a mandate of the federal government.[25] The judge may also receive remuneration for teaching.[26]

It is interesting to compare the provincial and territorial legislation just discussed with the federal legislation which governs the extra-judicial activities of superior court judges.[27] The federal legislation is similar to the provincial and territorial legislation in that it also provides a

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[13]NB, s. 22.1(1).

[14]NB, ss. 22.1(2), 22.2(2) and (4).

[15]NB, s. 22.2(3).

[16]NB, s. 22.2(5).

[17]NB, ss. 22.2(5) and (6).

[18]NB, ss. 22.3(1) and (2).

[19]NB, s. 22.3(3).

[20]NB, s. 22.4(1).

[21]PQ, ss. 130 and 131.

[22]PQ, ss. 132 and 133.

[23]PQ, s. 134.

[24]PQ, ss. 130 and 131.

[25]PQ, ss. 132 & 133.

[26]PQ, s. 134.

[27]*Judges Act*, R.S.C. 1985, c.J-1.

general restriction on extra-judicial activities of judges: with certain exceptions, a judge must not engage in an occupation or business other than his judicial duties.[28] With respect to the exceptions allowed to this general restriction, the federal legislation most resembles that of Manitoba. For example, the federal Act provides that a judge cannot act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on a commission, inquiry or other proceeding unless expressly authorized by a federal act or appointed or authorized by the Governor General in Council for matters within federal jurisdiction. For matters within provincial jurisdiction, the judge must be expressly authorized by a provincial Act or appointed or authorized by the provincial Lieutenant Governor in Council.[29] In addition, the Act prohibits a federally-appointed judge from receiving any salary, fee, remuneration, other emolument, expense or allowance for work as a commissioner, arbitrator, adjudicator, referee, conciliator, mediator (on a commission, inquiry or other proceeding), administrator or deputy of the Governor General. The judge must also not receive remuneration for any work (whether judicial or executive) that he or she must perform for a provincial or federal government, except for moving or transportation expenses and reasonable travel and other expenses incurred away from his or her ordinary place of residence while acting in any of these capacities (in the same amount and under the same conditions as if performing a judicial function). He or she is only to be compensated for those expenses which are paid for matters within federal jurisdiction by the federal government and for matters within provincial jurisdiction by the provincial government.[30] In addition, a judge may receive remuneration under provincial legislation to a maximum of $3,000 for extra-judicial work other than as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on a commission, inquiry or other proceeding.[31]

2. Model Acts

Organizations in Canada and elsewhere have proposed standards for judicial conduct.

The Model Provincial Court Act drafted by the Canadian Association of Provincial Court Judges Committee on Judicial Independence[32] provides that a Provincial Court judge must devote his or her whole time to his or her judicial duties, except that the judge may act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator on a commission, inquiry or proceeding or engage in other extra-judicial functions with the approval of the Chief Judge of the Provincial Court.[33] He or she cannot accept extra salary, fee, remuneration or other emolument other than reasonable travelling or other expenses incurred in this capacity.[34]

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[28] *Judges Act*, R.S.C. 1985, c.J-1, s. 55.

[29] *Judges Act*, R.S.C. 1985, c.J-1, s.56(1). This does not apply to judges acting as arbitrators or assessors of compensation or damages under the *Railway Act* or any other public act which authorizes or requires a judge to assess or ascertain compensation or damages without authority from the Governor in Council: *Judges Act*, R.S.C. 1985, c. J-1, s. 56(2).

[30] *Judges Act*, R.S.C. 1985, c.J-1, ss. 57(1) and (3).

[31] *Judges Act*, R.S.C. 1985, c.J-1, s. 57(2).

[32] Committee on Judicial Independence, Canadian Association of Provincial Court Judges, "Model Act (Provincial Court)" (1987, No. 4), 11 Prov. Judges J. 21.

[33] *Supra* n. 32, ss. 4(1) and (2).

[34] *Supra* n. 32, s. 4(3).

The United States' *Code of Judicial Conduct* contains more extensive guidelines for extra-judicial activities.[35] The following provisions are relevant to this discussion.

> Canon 4:
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> A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:
>
> A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
>
> B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.
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> C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.
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> Canon 5E:
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> A judge should not act as an arbitrator or mediator.
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> Canon 5G:
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> A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Other provisions provide guidelines for judicial conduct in matters of avocational activities (Canon 5A), civic and charitable activities (Canon 5B), financial activities (Canon 5C), fiduciary activities (Canon 5D), the practice of law (Canon 5F), and political activities (Canon 7).

Finally, the International Bar Association has drafted a *Code of Minimum Standards of Judicial Independence*.[36] It prohibits a judge in office from serving in an Executive capacity (such as minister of the government or member of the Legislature or a municipal council), unless long historical tradition has combined these functions with judicial office.[37] A judge may serve as chairman of an inquiry where fact-finding and evidence-taking skills are required[38] but cannot hold a position in a political party,[39] practise law (except for temporary judges),[40] or participate in business activities except for personal investment or ownership of property.[41]

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[35]*The Code of Judicial Conduct* (1972), 58 A.B.A.J. 1207.

[36]*International Bar Association Code of Minimum Standards of Judicial Independence* in *Judicial Independence: The Contemporary Debate* (S. Shetreet and J. Deschênes eds. 1985) 388.

[37]*Ibid.*, s. 36.

[38]*Supra* n. 36, s. 37.

[39]*Supra* n. 36, s. 38.

[40]*Supra* n. 36, s. 39.

[41]*Supra* n. 36, s. 40.

C. ANALYSIS

As mentioned in the introduction to this Chapter, the participation of judges in certain extra-judicial activities is considered appropriate and beneficial not only to the community but also to the judiciary. This is true for the teaching of law; that a judge is qualified to lecture in law to law students enhances the individual judge's credibility and raises the status of the entire judiciary.[42] The participation of judges in law reform is also considered an appropriate activity. The commentary to Canon 4 of the United States' *Code of Judicial Conduct* provides the rationale. It states:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.[43]

Other activities are obviously not suitable for participation by the judiciary. The practice of law is an example. This is an activity which would shatter the appearance of impartiality and give rise to charges of reciprocal favoritism should one judge appear as advocate in the courtroom of another.[44] Another example is the participation of judges as police commissioners. As Judge Perkins stated:

> . . . [T]he controversial nature of such a position is so obvious that in my view there is no good reason why a judge with any criminal jurisdiction should be a police commissioner and there are very good reasons why he should not . . . . [T]he two positions are completely incompatible.[45]

The participation or non-participation of judges in these activities is not usually the subject of controversy because the appropriateness of the former and inappropriateness of the latter is so obvious that judges rarely, if ever, exceed acceptable bounds.[46] However, the appointment of judges by governments to commissions of inquiry is a controversial issue which deserves further discussion. There are both advantages and disadvantages associated with the participation of judges in inquiries.

The most important advantage of selecting judges as commissioners of inquiry is the respect which they command. The involvement of a judge gives an inquiry an aura of reliability and impartiality, so that the conclusions made by the inquiry are given greater weight than they might otherwise be given.[47] Judges are seen as less susceptible to bias because of their judicial

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[42]C.E. Perkins, "The Extra-Judicial Role" (1979, No. 3), 3 Prov. Judges J. 12 at 14.

[43]*The Code of Judicial Conduct*, *supra* n. 35.

[44]S. Lubet, *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges* (1984) 22.

[45]*Supra* n. 42, at 13.

[46]Only in the State of Victoria (Australia) are judges rarely appointed as commissioners of inquiries. The lack of appointments is attributable primarily to the attitude adopted by the justices themselves, namely that appointments are detrimental to the primary function of the judiciary. This attitude can be traced to a 1923 document (known as the Irvine memorandum) in which Chief Justice Sir W. Irvine refused a request from the Attorney General to appoint a judge to head an inquiry: L.A. Hallett, *Royal Commissions and Boards of Inquiry* (1982) 60.

[47]Canadian Bar Association, Committee on the Independence of the Judiciary in Canada, *Report* (1985); The Rt. Hon. Lord Justice Salmon, *Royal Commission on Tribunals of Inquiry* (1966) Cmnd. 3121, at 29-30, para. 72; G. Winterton, "Judges as Royal Commissioners" (1987), 10 U.N.S.W.L.J. 108 at 113; The Hon. Sir M. McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978), 52 Austl. L.J. 540 at 541; S. Lubet, *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges* (1984).

experience and the improbability of any benefit or future preferential treatment due to their security of tenure.[48]

Furthermore, the community deserves to have public inquiries headed by commissioners who are best equipped for the job.[49] Judges are particularly well suited to head fact-finding inquiries due to their expertise in ascertaining facts and weighing evidence.[50] The matters which they might investigate include inquiries into natural or human disasters, government misconduct or corruption, as well as contested fact situations, especially where individual reputations are at stake and the civil liberties of witnesses or suspects need protection.[51] The subject matter of an inquiry may also be particularly suited to a judge,[52] such as (for example) a matter of great importance arising during a national emergency.[53] One commentator has suggested that the public may demand a judicial inquiry on an important and sensitive topic such as national security.[54] Finally, it has been suggested that judges should participate in inquiries to avoid a perception of irrelevance with respect to public concerns.[55]

In addition to the advantages associated with judicial participation, there are several reasons why a judge may be tempted to accept an appointment to a commission of inquiry. Not only might a judge be flattered to be asked to head an inquiry, he or she may also consider the subject matter of the inquiry to be more interesting or a welcome change from the disputes which the judge is asked to resolve in his or her judicial role.[56] In addition, the judge may feel morally obliged to make available his or her special expertise in weighing evidence and assessing credibility.[57]

However, there are also a number of problems which may result from the appointment of judges to commissions of inquiry. For example, on assuming the role of chairperson of a public inquiry, the judge may become embroiled in controversy and thus become subject to criticism. Ordinarily, decisions in court are made on the basis of the doctrine of legal precedent; that is, the judge relies upon previously decided decisions of other courts in determining the issues of the case. As a commissioner of inquiry, the judge generally cannot rely on this doctrine; the decisions made in that capacity are more clearly associated with the judge as an individual, rather than with principles established in earlier cases.[58] Furthermore, the judge is not allowed to respond to criticisms of decisions made during the course of the inquiry, and cannot publicly defend his or her actions. These criticisms may become associated with the judge's work on

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[48]J.D. Holmes, "Royal Commissions" (1955-56), 29 Austl. L.J. 253 referring to D.I. Menzies; Winterton, *supra* n. 47, at 114.

[49]Holmes, *supra* n. 48, at 267.

[50]Law Reform Commission of Canada, *Commissions of Inquiry*, Working Paper #17 (1977) 32; Mr. Justice B. Dickson, "The Role and Function of Judges" (1980), 14 L. Soc. Gaz. 138; Salmon, *supra* n. 47, at 29-30, para. 72; McInerney, *supra* n. 47, at 541.

[51]Winterton, *supra* n. 47, at 112.

[52]Canadian Bar Association, *supra* n. 47, at 43; Winterton, *supra* n. 47, at 112.

[53]Hallett, *supra* n. 46, at 61.

[54]Winterton, *supra* n. 47, at 113.

[55]Winterton, *supra* n. 47, at 116, referring to Mr. Justice Brennan.

[56]McInerney, *supra* n. 47, at 551.

[57]*Supra* n. 42.

[58]T. Black, "Judges and Royal Commissions", [1982] N.Z.L.J. 37; Report of the Committee on the Judiciary of the United States Senate, "Independence of Judges: Should They Be Used for Non-Judicial Work?" (1947), 33 A.B.A.J. 792 at 795; McInerney, *supra* n. 47. *But see* Holmes, *supra* n. 48, at 266, referring to D.I. Menzies.

returning to the Bench, thereby impairing his or her value as a judge.[59] The independence and impartiality of the judge, and perhaps the entire Bench, may thus be diminished.[60]

In addition, the subject matter and possibility for controversy of certain inquiries renders them particularly inappropriate for judicial involvement. Inquiries often study issues which are political in nature,[61] policy-oriented (as opposed to fact-finding) or socio-economic (rather than legal).[62] The frequent appointments of judges to commissions which are involved in controversy may erode the public's confidence and respect for the judiciary.[63] As one commentator stated:

> A decision that the participation of a prestigious judge will help to create public confidence in the outcome presupposes that the matter is controversial. That controversy is not likely to be entirely stilled . . . however impeccable the credentials of the participants. The risk, which we have no way of measuring in advance, is that the judiciary will not emerge unscathed from the controversy, thereby impairing its ability to perform its primary role.[64]

A third disadvantage associated with judicial participation in inquiries is that time spent away from regular judicial duties increases the burden on the remaining judges in the court. This may result in the judge's own judicial work suffering, and it inevitably increases court backlogs.[65]

Judge C.E. Perkins suggests three principles to determine the propriety of judicial involvement in extra-judicial activities:

(1) the activity should not intrude "on the time necessary to handle [the judge's] . . . case load",

(2) the activity must not concern "a matter which might be controversial in the minds of a significant number of the people in the community he serves as provincial Judge or in which he might be considered to demonstrate a bias for or against the Crown or for or against any group of persons" and

(3) the "Judge should not earn a significant percentage of his income from extra-judicial responsibilities."[66]

These principles are straightforward and capable of application. We urge the person or body who is to make the decision regarding judicial participation in commissions of inquiry to consider these guidelines.

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[59]A.T. Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone" (1953-54), 67 Harv. L. Rev. 193 at 203-204.

[60]Canadian Bar Association, *supra* n. 47, at 43; Perkins, *supra* n. 42, at 13; M. Robert, "Comment", in *The Canadian Judiciary* (A.M. Linden ed. 1976) 18 at 22-23; Winterton, *supra* n. 47, at 111; Hallett, *supra* n. 46, at 60-65; McInerney, *supra* n. 47, at 550. *But see* Holmes, *supra* n. 48, at 266-267, referring to D.I. Menzies.

[61]Law Reform Commission of Canada, *supra* n. 50, at 32; Robert, *supra* n. 60, at 22; Winterton, *supra* n. 47, at 109; Mason, *supra* n. 59, at 203.

[62]Dickson, *supra* n. 50, at 162; Winterton, *supra* n. 57, at 110.

[63]Dickson, *supra* n. 50, at 162; G. Zellick, "Comment", [1972] Pub.L. 1 at 5; Report of the Committee on the Judiciary of the United States Senate, *supra* n. 58, at 795.

[64]T. Sandalow of the University of Michigan Law School in an address to the Senate Judiciary Committee's Sub-Committee on the Separation of Powers, quoted in Zellick, *supra* n. 63, at 4-5.

[65]Canadian Bar Association, *supra* n. 47, at 43; Dickson, *supra* n. 50, at 162; Report of the Committee on the Judiciary of the United States Senate, *supra* n. 58, at 795; Lubet, *supra* n. 44; Winterton, *supra* n. 47, at 110; Hallett, *supra* n. 46, at 67; Black, *supra* n. 58.

[66]Perkins, *supra* n. 42, at 12-13.

We have carefully considered a variety of issues with respect to judicial participation in extra-judicial activities. The concerns raised by the commentators, particularly with respect to commissions of inquiry, are significant; it is quite clear that there are some extra-judicial activities which are so political or controversial in nature that it would be inappropriate for judges of the Provincial Court to take part in them. Their perceived independence and impartiality would be seriously damaged. Furthermore, it is also necessary that if provincial judges are to engage in extra-judicial activities the activity in question be of a limited duration. Otherwise, the normal activities and operations of the court will suffer from a reduced complement of judges, and those in charge of court administration and the rotation of judges will be placed in a very difficult position. At the same time, we recognize that there are some situations where the involvement of a Provincial Court judge as a commissioner of inquiry will both benefit the community and enhance the status of the Bench, while not involving the judge in a matter which is so political or controversial as to taint him or her with the brush of "bias".

We have concluded that it is essential that Provincial Court judges not be automatically called upon to engage in extra-judicial activities simply at the request of government. Instead, there should be a decision by someone who can assess the potential harm to the provincial judiciary's image (i.e. in matters which are controversial or political). This person must also be able to determine whether or not the absence of a particular judge or judges will unduly affect the day-to-day activities of the Provincial Court and the strength of its Bench. The person best able to make this assessment and decision is the Chief Judge of the Provincial Court. The Chief Judge has daily contact with the judges of the Court and is responsible for their assignment and the direction generally of the activities of the Court. The Chief Judge will clearly be able to determine whether a judge's participation in an inquiry is in the best interests of the administration of justice in the province.

In our view, the permission of the Chief Judge of the Provincial Court of Manitoba should be obtained in any circumstance where a judge is asked to engage (or wishes to engage) in any form of extra-judicial activity. The decision which we have reached would also encompass those situations where a provincial judge wishes to engage in some work which may be pursued primarily in his or her spare time, but which may affect his or her abilities to undertake a full load of judicial duties. This would include situations such as the judge wishing to devote less than full time to the performance of his or her duties either to write a book or act as a lecturer or even engage in work which is unrelated to the development and understanding of the law. In these circumstances, too, the Chief Judge will best be suited to assess the importance of the work generally and the effect which granting the judge time to carry out the activity will have on the normal operations of the Provincial Court.

We therefore recommend:

RECOMMENDATION 95

That provincial judges should not practise any profession or actively engage in any business, trade or profession and should not, except with the prior approval of the Chief Judge,

(a) act as a commissioner, arbitrator, referee, conciliator, umpire or mediator on any matter or proceeding; or

(b) devote less than full time to the performance of their duties as judges.

We also believe that judges should not be able to accept any additional remuneration for their extra-judicial work which interferes with or diminishes the time normally devoted to the

execution of their judicial duties.[67] A judge's source of income should be that which is related to judicial duties. Otherwise, judges may be tempted to engage in any number of extra-judicial activities simply because of the remuneration which would be paid. Furthermore, it is potentially damaging to the public perception of the independence of the judiciary if judges can be seen as being "enticed" away from their regular duties in order to accept an extremely lucrative second career. Therefore, we believe that a judge should not usually be entitled to remuneration for the performance of any extra-judicial activity in which he or she is allowed to take part. The only remuneration which should be payable to the judge during this time is the normal judge's salary as judge.

However, the judge should not be prevented from accepting compensation for reasonable travelling or other expenses which he or she incurred while engaging in any permitted extra-judicial activity. For example, a judge may be forced to temporarily relocate as a result of his or her involvement in the activity; the usual expenses associated with a relocation (such as moving expenses, travel, and accommodation) would of course be compensable. We recommend:

RECOMMENDATION 96

That a judge participating in an extra-judicial activity approved by the Chief Judge shall not accept any salary, fee or other remuneration other than reasonable travelling or other expenses incurred by him or her while acting in such a capacity.

[67]The Canadian Bar Association has stated that "No financial reward should be attached to this type of work, it being a service to the public . . . [except that] travelling expenses should be adequate.": Canadian Bar Association, *supra* n. 47, at 44. This corresponds to the provision in the Model Provincial Court Act and the federal *Judges Act* but is contrary to provisions in Québec's legislation: *supra* n. 32, s. 4(3); *Judges Act*, R.S.C. 1985, c. J-1, s. 57; PQ, ss. 130-134.

CHAPTER 10

LIST OF RECOMMENDATIONS

The recommendations of the Commission in this Report are as follows:

CHAPTER 3 - APPOINTMENTS

1. That *The Provincial Court Act* be amended to provide that judges be appointed by the Lieutenant Governor in Council from a list of names provided to the Attorney General by a nominating committee. (p. 32)

2. That the nominating committee not be the Judicial Council. (p. 33)

3. That each nominating committee should be composed of 5 persons:

   (a) two should be named by the Lieutenant Governor in Council and should not be lawyers, judges or retired judges;

   (b) one should be a Provincial Court judge, named by the judges of that Court;

   (c) one should be a full-time member of the Faculty of Law of the University of Member, elected by the Faculty Council; and

   (d) one should be jointly named by the President of the Law Society of Manitoba and the President of the Manitoba Branch of the Canadian Bar Association. (p. 33)

4. That a nominating committee should be appointed on an *ad hoc* basis each time a vacancy on the Provincial Court occurs or is anticipated. (p. 34)

5. That the chair of each nominating committee should be named by the Lieutenant Governor in Council from among its members. (p. 34)

6. That the nominating committees should be required to advertise for candidates for the vacancy to be filled. (p. 34)

7. That the nominating committees should be entitled to receive nominations for vacancies, so long as the nominee consents to his or her nomination. (p. 34)

8. That the nominating committees be entitled to seek out and recruit candidates for vacancies. (p. 35)

9. That the nominating committees should state in their advertisements the general criteria for selection which they will use. (p. 37)

10. That, apart from the continued requirements that candidates for the Provincial Court be members of the Law Society of Manitoba entitled to practise law and have so practised for at least five years, the determination of the criteria to be employed should be in the discretion of each nominating committee. (p. 37)

11. That each nominating committee provide to the Attorney General a list of not fewer than three and not more than six names of individuals whom it recommends for the particular vacancy. (p. 37)

12. That the nominating committees not rank the names on the list of recommended candidates submitted to the Attorney General, but that they have the discretion to designate any one or more of the names on their lists as "highly recommended". (p. 38)

13. That the Lieutenant Governor in Council, on the recommendation of the Attorney General, be obliged to fill the particular vacancy for which the nominating committee was formed with an individual named on the list submitted by the nominating committee. The Attorney General should not be permitted to ask for a new list. (p. 38)

14. That, in the event that the Attorney General chooses an individual from the list submitted by the nominating committee and that individual then declines or is unable to accept the appointment, the nominating committee be required to add a further name to its list. (p. 38)

15. That all aspects of the screening and selection process be kept strictly confidential. (p. 39)

16. That the nominating committees be under no obligation to advise a candidate why he or she was not nominated. (p. 39)

CHAPTER 4 - REMUNERATION

17. That the present method by which the remuneration of provincial judges is established be replaced. (p. 42)

18. That *The Provincial Court Act* be amended to provide for the establishment of an independent committee for the purpose of determining the remuneration of Provincial Court judges. (p. 52)

19. That the decisions of the independent committee be legally binding unless the Legislature votes to the contrary within a specified period of time. (p. 52)

20. That the independent committee be composed of three members:

    (a) one of whom shall be named by the provincial judges; and

    (b) two of whom shall be named by the provincial government (the Cabinet). (p. 53)

21. That not more than one of the government's appointees be a person employed on a full-time basis by the provincial government. (p. 53)

22. That the independent committee have the power to hire experts and consultants and the budget necessary to pay them. (p. 53)

23. That the independent committee be convened every two years. (p. 54)

24. That the Attorney General also be empowered, in extraordinary circumstances, to convene a committee at any other time. (p. 54)

25. That the independent committee's jurisdiction extend to all aspects of remuneration, including pensions, vacations, sick leave and other benefits. (p. 54)

26. That the independent committee recognize as an urgent priority the revision of the pension plan applicable to provincial judges with a view to reducing significantly the number of years of service required to attain full pension. (p. 55)

27. That Provincial Court judges should be entitled as of right to elect to take supernumerary status upon:

    (a) attaining the age of 60 years and having continued in judicial office for at least 20 years; or

    (b) attaining the age of 65 years and having continued in judicial office for at least 15 years; or

    (c) attaining the age of 70 years and having continued in judicial office for at least 10 years. (p. 58)

28. That Provincial Court judges should be entitled to elect to hold supernumerary status for such period not exceeding five years as they determine at the time of the election; this term should not be renewable. (p. 59)

CHAPTER 5 - DISCIPLINE

29. That there be a clear division between the investigative/prosecutorial and adjudicative functions in judicial discipline proceedings and that the two functions be dealt with by different bodies. (p. 69)

30. That *The Provincial Court Act* be amended to establish a new judicial disciplinary process having three tiers:

    (a) the Chief Judge (to deal with minor matters);

    (b) an investigative body (called the Judicial Inquiry Board) to investigate and prosecute more significant matters and, where requested, to reconsider complaints dealt with by the Chief Judge; and

    (c) an adjudicative body (called the Judicial Council) to hear and determine charges brought by the Judicial Inquiry Board. (p. 71)

31. That complaints (other than those against the Chief Judge) be directed to the Chief Judge of the Provincial Court and that complaints respecting the Chief Judge be directed to the Judicial Inquiry Board. (p. 71)

32. That the Chief Judge deal with complaints by:

    (a) attempting to resolve the matter informally;

    (b) advising the complainant that there is no basis for a complaint or that a more appropriate avenue should be pursued (such as an appeal from the judicial decision giving rise to the complaint); or

    (c) immediately referring the complaint to the Judicial Inquiry Board. (p. 71)

33. That a complainant or judge who is dissatisfied with the disposition of the complaint by the Chief Judge be entitled to take the matter to the Judicial Inquiry Board. (p. 71)

34. That there be an onus upon the Chief Judge to inform all complainants that, if they are dissatisfied with a disposition of the complaint by the Chief Judge, they may take the matter to the Judicial Inquiry Board. (p. 71)

35. That the Chief Judge shall not deal with a complaint and shall instead promptly refer it to the Judicial Inquiry Board where it is alleged that:

    (a) a judge has committed an indictable offence; or

    (b) a judge has been guilty of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (p. 72)

36. That complaints to the Chief Judge and the Judicial Inquiry Board be in writing and be signed by the complainant. (p. 72)

37. That the Chief Judge be empowered to review, on his or her own initiative, any matter regarding the conduct or fitness of a judge which comes to his or her attention; and that the Judicial Inquiry Board have the same power. (p. 72)

38. That, although complainants should, where they so desire, be accorded the maximum amount of confidentiality possible, it must be recognized and explained that it will be difficult to maintain confidentiality at the investigative stage and impossible to maintain at the adjudicative stage. (p. 72)

39. That information respecting the discipline and complaint process should be made available to the public. (p. 73)

40. That the Judicial Inquiry Board be comprised of three persons:

    (a) a lawyer appointed by the Lieutenant Governor in Council;

    (b) a person who is not a lawyer, judge or retired judge, also appointed by the Lieutenant Governor in Council; and

    (c) a person named by the provincial judges. This member shall not be the Chief Judge. In the event that this member becomes the subject of a complaint to the Judicial Inquiry Board, he or she shall be replaced by another person named by the provincial judges until the complaint is disposed of. (p. 73)

41. That the members of the Judicial Inquiry Board hold office for terms of three years. (p. 74)

42. That the members of the Judicial Inquiry Board be eligible to have their terms renewed once only. (p. 74)

43. That the members of the Judicial Inquiry Board and persons who are employed or retained by them as investigators have all of the powers and protection of commissioners appointed under *The Manitoba Evidence Act*. (p. 74)

44. That the Judicial Inquiry Board have the power to engage counsel and agents as they determine appropriate. (p. 74)

45. That, upon receipt of a complaint (or upon initiation of an investigation on its own motion), the Judicial Inquiry Board have the power to:

    (a) investigate the matter;

    (b) informally resolve the matter, if it can obtain the agreement of the judge in question and the complainant (where there is one);

    (c) lay charges of misconduct before the Judicial Council;

    (d) not lay charges;

    (e) prosecute any or all charges laid by it;

    (f) stay charges laid by it. (p. 75)

46. That decisions of the Judicial Inquiry Board be made by a majority of its members. (p. 76)

47. That the filing of charges by the Judicial Inquiry Board be a matter of public record. (p. 76)

48. That the decision to lay charges, not lay charges, or stay charges be within the sole discretion of the Judicial Inquiry Board and that no appeal lie from such decisions. (p. 76)

49. That, where the Judicial Inquiry Board decides not to lay charges against a judge, it give a written explanation of its decision to the complainant. (p. 76)

50. That the Judicial Council be composed of nine persons, namely:

    (a) the Chief Justice of Manitoba, or another judge of the Manitoba Court of Appeal designated by him or her;

    (b) the Chief Justice of the Court of Queen's Bench of Manitoba, or another judge of that Court designated by him or her;

    (c) two judges of the Provincial Court, named by the judges of that Court;

    (d) the President of the Law Society of Manitoba or his or her designate;

    (e) the President of the Manitoba Branch of the Canadian Bar Association or his or her designate; and

    (f) three persons, who shall not be lawyers, judges or retired judges, appointed by the Lieutenant Governor in Council. (pp. 77-78)

51. That the quorum for the Judicial Council be six. (p. 78)

52. That the following persons not be members of the Judicial Council:

    (a) the Chief Judge of the Provincial Court; and

    (b) any sitting member of the Judicial Inquiry Board. (p. 78)

53. That any person who has participated in the receipt or investigation of a complaint against a judge of the Provincial Court shall not participate as a member of the Judicial Council in any proceeding of the Judicial Council respecting that complaint. (p. 78)

54. That the Chief Justice of Manitoba or his or her designate chair the Judicial Council. (p. 78)

55. That the term of office of the members of the Judicial Council who do not sit *ex officio* (the lay people and the provincial judges) be three years. (p. 79)

56. That the members of the Judicial Council who do not sit *ex officio* be eligible to be reappointed once only. (p. 79)

57. That there be no provision for suspending a judge while an investigation into his conduct is pending. However, the Chief Judge would remain free to reassign such a judge to administrative duties. (p. 79)

58. That, upon the filing of charges against a judge by the Judicial Inquiry Board, the judge should be automatically suspended unless the Judicial Inquiry Board waives the suspension. (p. 80)

59. That, unless a member of the Judicial Council (designated for the purpose by the chair of the Judicial Council) decides otherwise upon an application of the Judicial Inquiry Board, the suspension of a judge should be with pay. (p. 81)

60. That the member of the Judicial Council who hears such an application for suspension of a judge without pay be barred from further participation in the matter. (p. 81)

61. That the Judicial Council hold its hearings in public, unless it determines that it is in the public interest that they be held in private. (p. 83)

62. That the Judicial Council be empowered to dispose of matters heard by it in one or more of the following ways:

    (a) by dismissing the complaint;

    (b) by reprimanding the judge;

    (c) by fining the judge;

    (d) by suspending the judge for a fixed period of time;

    (e) by removing the judge;

    (f) by ordering costs in favour of or against the judge or the Judicial Inquiry Board;

(g) by requiring the judge to take a leave of absence (with or without pay) for the purpose of obtaining treatment;

(h) where the judge is unable to perform the duties of his or her office by reason of disability, by ordering that the judge be deemed to have voluntarily resigned with full pension;

(i) by ordering that all or part of any salary forfeited by the judge during suspension (prior to the inquiry) be remitted, provided that the Council does not order the judge to be suspended or removed from office. (pp. 84-85)

63. That the Judicial Council not hear moot cases. The departure from office of a judge should terminate the jurisdiction of the Judicial Council in the matter. (p. 85)

64. That both the judge and the Judicial Inquiry Board be permitted to appeal a decision of the Judicial Council (as to guilt or penalty or both) to the Manitoba Court of Appeal. (p. 86)

65. That *The Provincial Court Act* continue to use the grounds for discipline presently set out therein (conduct unbecoming a judge or the neglect of duty by a judge or the inability or incapacity of a judge to perform his or her duties). (p. 90)

66. That the Judicial Council accord high priority to the development of a Judicial Code of Conduct, breach of which would be grounds for disciplinary action. (p. 90)

67. That the Attorney General should no longer be treated differently from other complainants. Complaints by the Attorney General should be made and dealt with in the same manner as those of any other complainant. (p. 90)

CHAPTER 6 - EVALUATION

68. That a judicial evaluation program be established for the judges of the Provincial Court of Manitoba. (p. 93)

69. That the evaluation program initially be undertaken as a pilot program, concentrating on recently appointed judges. (p. 93)

70. That the judicial evaluation program be developed and supervised by a body, to be called the Judicial Performance Committee, composed of:

(a) two persons named by the provincial judges; and

(b) three persons named by the Lieutenant Governor in Council. (p. 96)

71. That at least two of the members of the Judicial Performance Committee appointed by the Lieutenant Governor in Council should not be lawyers, judges, or retired judges. (p. 96)

72. That the program be established by regulation under *The Provincial Court Act*. (p. 96)

73. That the day-to-day work of collecting and distributing instructions and forms and collating data be performed by a member of the court staff. (p. 98)

74. That appropriate security measures be employed to ensure the confidentiality of data collected in the course of the evaluation program. (p. 98)

75. That the program consist of a survey of lawyers who have appeared before the judge being evaluated over a specified period of time and non-lawyers who, in the opinion of the Judicial Performance Committee, regularly attend sittings of the Provincial Court and can meaningfully evaluate the performance of the judge in question. (p. 99)

76. That the following two approaches be seri- ısly considered for use in the pilot project:

    (a) a 'per case' approach for judges who have been sitting in trial courts or preliminary hearings (major proceedings); and

    (b) a survey of lawyers appearing regularly over a certain period of time before a given judge sitting in docket court; they should be asked to base their evaluation on the performance of the judge over the period of time, rather than on a specific trial. (p. 102)

77. That the evaluation questionnaire be concerned solely with judicial performance and not attempt to assess the substance of rulings. (p. 104)

78. That confidentiality and anonymity be assured to the respondents of the survey. (p. 104)

79. That the data from the judicial evaluation program not be released except as follows:

    (a) data about a judge being evaluated should be released to that judge;

    (b) aggregate data should be released to all judges who are being evaluated (for comparative purposes);

    (c) specific data should be released to the Chief Judge (for the purpose of assigning judges and providing guidance to them);

    (d) aggregate or anonymous data should be released to the Judicial Performance Committee (to assist in the identification of educational needs). (p. 107)

80. That data from the pilot program not be released to the public. (p. 108)

81. That, when an on-going evaluation program is implemented, consideration should be given to the release of anonymous or aggregate data to the public and specific data about a given judge with the consent of that judge and the Judicial Performance Committee. (p. 108)

82. That evaluations not be used for disciplinary purposes. (p. 109)

CHAPTER 7 - JUDICIAL IMMUNITY

83. That Provincial Court judges have the same immunity from suit as superior court judges. (p. 131)

CHAPTER 8 - THE CHIEF JUDGE

84. That *The Provincial Court Act* be amended to require the appointment of a Chief Judge of the Provincial Court. (p. 133)

85. That the Chief Judge of the Provincial Court be appointed in the same manner as the other judges of that Court; that is, the Chief Judge should be appointed by the Lieutenant Governor in Council from a list of names provided to the Attorney General by a nominating committee. (p. 133)

86. That all sitting provincial judges and any other person eligible for appointment as a provincial judge be entitled to apply to the nominating committee for the position of Chief Judge. (p. 134)

87. That the Chief Judge hold that office during good behaviour. (p. 135)

88. That the Chief Judge be permitted to step down from that office at any time and thereafter carry out the normal duties of a Provincial Court judge. (p. 135)

89. That if, after completing ten years of service as Chief Judge, the Chief Judge decides to step down from that office and resume duties as a judge of the Provincial Court, his or her salary should remain at the level normally paid to the Chief Judge. (p. 135)

90. That, if formal charges are filed by the Judicial Inquiry Board against the Chief Judge, he or she be automatically suspended both as a judge of the Provincial Court and as the Chief Judge of that Court. (p. 136)

91. That the Judicial Inquiry Board be empowered, in its discretion, to suspend the Chief Judge from that office, while at the same time allowing him or her to carry out the normal duties of a judge of the Provincial Court. (p. 136)

92. That, if the Chief Judge is suspended from that office, either by the Judicial Inquiry Board pending a formal inquiry or by the Judicial Council upon disposition of any charges against the Chief Judge, the most senior of the Associate Chief Judges should replace the Chief Judge for the duration of the suspension. (p. 136)

93. That the Judicial Council be empowered to order the following additional sanctions specifically in respect of the Chief Judge:

    (a) suspension from the office of Chief Judge for a definite period of time;

    (b) removal from the office of Chief Judge, without affecting the individual's status as an ordinary judge of the Court. (p. 137)

94. That the Chief Judge of the Provincial Court of Manitoba be responsible for the general overall supervision of the judges of the Court and the supervision and direction over Court staff in matters that are assigned by law to the judiciary of the Provincial Court. (p. 137)

CHAPTER 9 - EXTRA-JUDICIAL ACTIVITIES

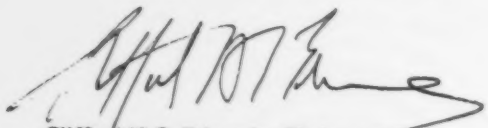
95. That provincial judges should not practise any profession or actively engaged in any business, trade or profession and should not, except with the prior approval of the Chief Judge,

    (a) act as a commissioner, arbitrator, referee, conciliator, umpire or mediator on any matter or proceeding; or

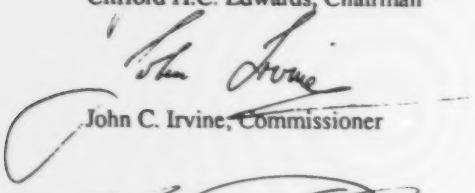
    (b) devote less than full time to the performance of their duties as judges. (p. 146)

96. That a judge participating in an extra-judicial activity approved by the Chief Judge shall not accept any salary, fee or other remuneration other than reasonable travelling or other expenses incurred by him or her while acting in such a capacity. (p. 147)

This is a Report pursuant to subsection 5(3) of *The Law Reform Commission Act*, signed this 28th day of June 1989.

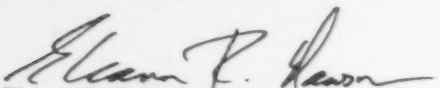


Clifford H.C. Edwards, Chairman



John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner



Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

NEW JERSEY SUPREME COURT QUESTIONNAIRES

SUPREME COURT OF NEW JERSEY
Committee on Judicial Performance

MELVYN H. BERGSTEIN, ESQ.
GEORGE T. BOYER
HON. DANIEL R. COBURN
HON. SAMUEL G. DeSIMONE
HON. DOMINICK J. FERRELLI
HON. GEOFFREY GAULKIN
HON. L. ANTHONY GIBSON
IRWIN I. KIMMELMAN, ESQ.
GEORGE F. KUGLER, ESQ.
HON. MARILYN LOFTUS
HON. RALPH V. MARTIN
LOUIS PASHMAN, ESQ.
HON. JAMES J. PETRELLA
WILLIAM B. SCATCHARD, JR., ESQ.
DEAN CATHERINE R. STIMPSON
JOHN L. WHITE, ESQ.
HON. ALAN B. HANDLER, Chairman

RICHARD L. SAKS, ESQ.
Project Director
RICHARD J. YOUNG
Assistant Project Director

CN-978
Trenton, New Jersey 08625
(609) 292-0622

Dear Attorney:

Please find enclosed for your completion, the Lawyers' Questionnaire. This questionnaire is authorized by the Supreme Court's Committee on Judicial Performance as part of the Judicial Performance Program. The program seeks to evaluate judges based upon their legal ability, judicial management skills and courtroom demeanor. The use of the evaluation information, in this phase of the program, shall be limited to the improvement of performance of the individual judge.

The Committee assures you complete confidentiality. The questionnaire is stamped with an identification number for mailing and tracking purposes only. Please do not sign the questionnaire. The identification number will allow us to check your name off of the mailing list when your questionnaire is returned. Your name will never be placed on, or associated with, the individual questionnaire.

You have been selected to complete the questionnaire based upon your recent participation before the judge in the case listed below.

The purpose of this questionnaire is to assess the judge's performance in the proceeding listed above. Your responses should be based exclusively on the above case. Please try to avoid letting your experience in other cases influence your responses concerning this case. If you are unable to respond to a question based upon your own direct observation, please check No Opinion or Not Applicable.

Please return your completed questionnaire in the enclosed stamped, addressed envelope.

Thank you for your cooperation.

Committee on Judicial Performance

sw
enclosure

LAWYERS' QUESTIONNAIRE RELATING TO HIGH-VOLUME COURTS AND SPECIAL PROCEEDINGS

Please read cover sheet before beginning this questionnaire, then begin here.
There is room for comments on page 4. Additional sheets may be attached if necessary.

Indicate the number of proceedings you have partcipated in or observed before this judge in the last two months:

a _____ Special Civil Part Proceedings

b _____ Pleas and Sentencings

c _____ Motions, Orders to Show Cause, Pretrial Conferences

d _____ Settlements

e _____ Miscellaneous Hearings

f _____ Probate

SECTION 1: LEGAL ABILITY

This section deals with legal competence, learning and understanding, and the judicial application of such knowledge in the conduct of court proceedings. Check only one response for each question.

Please assess the judge's performance in the proceedings with respect to:	EXCELLENT	MORE THAN ADEQUATE	ADEQUATE	LESS THAN ADEQUATE	POOR	NO OPINION or NOT APPLICABLE
1 Knowledge of relevant substantive law						
2 Knowledge of rules of procedure						
3 Ability to identify and analyze relevant issues						
4 Judgment in application of relevant laws and rules (whether or not you agreed with judge's rulings)						
5 Giving reasons for rulings when needed						
6 Clarity of explanation of rulings						
7 Adequacy of findings of facts						

AO8102 (7/87)

SECTION 2: JUDICIAL MANAGEMENT SKILLS

This section deals with judicial ability and skill in the organization, management and handling of court proceedings. Check only one response for each question.

Please assess the judge's performance in the proceedings with respect to:	EXCELLENT	MORE THAN ADEQUATE	ADEQUATE	LESS THAN ADEQUATE	POOR	NO OPINION OR NOT APPLICABLE
8 Effectiveness in narrowing the issues in dispute						
9 Moving the proceeding in an appropriately expeditious manner						
10 Maintaining appropriate control over the proceeding						
11 Punctuality						
12 Doing the necessary "homework" on the case						
13 Rendering rulings and decisions without unnecessary delay						
14 Allowing adequate time for presentation of the case in light of existing time constraints						
15 Resourcefulness and common sense in resolving problems arising during the proceeding						
Please assess the judge's settlement activities in this case (whether or not the case was settled) with respect to:						
16 Appropriateness of the judge's settlement initiatives (If less than adequate or poor, please explain in the Comments section.)						
17 Thoughtfully exploring the strengths and weaknesses of each party's case in settlement discussions with the attorneys						
18 Credibility of the judge's settlement appraisals						
19 Skills in effecting compromise						
20 Absence of coercion, threat or the like in settlement efforts (If less than adequate or poor, please explain in the Comments section.)						

SECTION 3: COMPORTMENT

This section deals with various aspects of judicial personality and behavior in the conduct of court proceedings, such as temperament, attitude and manner. Check only one response for each question.

Please assess the judge's performance in the proceedings with respect to:	EXCELLENT	MORE THAN ADEQUATE	ADEQUATE	LESS THAN ADEQUATE	POOR	NO OPINION or NOT APPLICABLE
21 Attentiveness						
22 Courtesy to participants						
23 Openmindedness						
24 Patience						
25 Absence of arrogance						
26 Absence of bias and prejudice based on race, sex, ethnicity, religion, social class, or other factor (If less than adequate or poor, please explain in the Comments section.)						
27 Ability to really listen						
28 Even-handed treatment of the litigants (If less than adequate or poor, please explain in the Comments section.)						
29 Even-handed treatment of attorneys (If less than adequate or poor, please explain in the Comments section.)						
30 Decisiveness						
31 Fostering a general sense of fairness						
32 Industriousness						

SECTION 4: BACKGROUND CHARACTERISTICS

(This information will be used for statistical analyses only.)

33 How long have you practiced law? _____ years

34 Is your principal law office located in the county in which this case was tried? ☐ Yes ☐ No

35 What percentage of your practice is litigation? _____ %

36 Is your litigation principally conducted in the county in which this case was tried? ☐ Yes ☐ No

37 Which of the following describes your primary law practice? (Please check one.)

☐ solo (including office sharing) ☐ law firm with 2-15 attorneys ☐ law firm with more than 15 attorneys

☐ public defender ☐ corporate or house counsel ☐ public agency counsel

☐ prosecutor ☐ other (please specify)

_____

SECTION 5: COMMENTS

If you wish to elaborate on any of your responses or comment further on aspects of the judge's performance, please use this space.

Please return your completed questionnaire in the enclosed stamped addressed envelope to:
Committee on Judicial Performance, CN-978, Richard Hughes Justice Complex, Trenton, NJ 08625

LAWYERS' QUESTIONNAIRE

Please read cover sheet before beginning this questionnaire, then begin here.
There is room for comments on page 4. Additional sheets may be attached if necessary.

SECTION 1: LEGAL ABILITY

This section deals with legal competence, learning and understanding, and the judicial application of such knowledge in the conduct of court proceedings. Check only one response for each question.

Please assess the judge's performance in the proceeding with respect to:	EXCELLENT	MORE THAN ADEQUATE	ADEQUATE	LESS THAN ADEQUATE	POOR	NO OPINION or NOT APPLICABLE
1 Knowledge of relevant substantive law						
2 Knowledge of rules of procedure						
3 Knowledge of rules of evidence						
4 Ability to identify and analyze relevant issues						
5 Judgment in application of relevant laws and rules (whether or not you agreed with judge's rulings)						
6 Giving reasons for rulings when needed						
7 Clarity of explanation of rulings						
8 Adequacy of findings of facts						
9 Clarity of judge's decision (either oral or written)						
10 Completeness of judge's decision (either oral or written)						
11 The judge's charge to the jury						

SECTION 2: JUDICIAL MANAGEMENT SKILLS

This section deals with judicial ability and skill in the organization, management and handling of court proceedings. Check only one response for each question.

Please assess the judge's performance in the proceeding with respect to:	EXCELLENT	MORE THAN ADEQUATE	ADEQUATE	LESS THAN ADEQUATE	POOR	NO OPINION or NOT APPLICABLE
12 Effectiveness in narrowing the issues in dispute						
13 Moving the proceeding in an appropriately expeditious manner						
14 Maintaining appropriate control over the proceeding						
15 Punctuality						
16 Doing the necessary "homework" on the case						
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23 Skills in effecting compromise						
24 Absence of coercion, threat or the like in settlement efforts (If less than adequate or poor, please explain in the Comments section.)						

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31 Ability to really listen						
32 Even-handed treatment of the litigants (If less than adequate or poor, please explain in the Comments section.)						
33 Even-handed treatment of attorneys (If less than adequate or poor, please explain in the Comments section.)						
34 Decisiveness						
35 Fostering a general sense of fairness						
36 Industriousness						

SECTION 4: BACKGROUND CHARACTERISTICS

(This information will be used for statistical analyses only.)

37 If you have appeared before this judge in other proceedings in the last three years, please indicate how many times _____

38 How long have you practiced law? _____ years

39 Is your principal law office located in the county in which this case was tried? ☐ Yes ☐ No

40 What percentage of your practice is litigation? _____ %

41 Is your litigation principally conducted in the county in which this case was tried? ☐ Yes ☐ No

42 What percentage of your practice is devoted to cases in the same area of law as is this case? _____ %

43 Which of the following describes your primary law practice? (Please check one.)

☐ solo (including office sharing) ☐ law firm with 2-15 attorneys ☐ law firm with more than 15 attorneys
☐ public defender ☐ corporate or house counsel ☐ public agency counsel
☐ prosecutor ☐ other (please specify)

_____

44 How would you describe the outcome of this proceeding?

☐ won ☐ won in part ☐ lost ☐ settled or stipulated
☐ other (please specify) _____

SECTION 5: COMMENTS

If you wish to elaborate on any of your responses or comment further on aspects of the judge's performance, please use this space.

_____

_____

_____

_____

_____

Please return your completed questionnaire in the enclosed stamped addressed envelope to:
Committee on Judicial Performance, CN-978, Richard Hughes Justice Complex, Trenton, NJ 08625